Supreme Court, U.S.
FILED

06-918 JAN 01 2007

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Bradley S. Logan, MD,
Petitioner,

v.

HCA, Inc., et.al.,
Respondents

On Petition for Writ of Certiorari to the
The United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Bradley S. Logan, MD
, Counsel Pro Se
2202 N. West Shore Blvd., Suite 200
Tampa, FL 33607
813-333-1516

QUESTIONS PRESENTED

1. Do state peer review proceedings operate under color of state law thus permitting a claim under 42 U.S.C. 1983 for Fourteenth Amendment scrutiny?

2. Is the federal civil statute, the Health Care Quality Improvement Act of 1986 (HCQIA) 42 U.S.C. § 11101 et seq., to be construed as to never imply a federal cause of action, in derogation of inalienable and constitutional liberty and property rights?

3. Did the Petitioner's claim satisfy the requirements of a RICO claim under 18 U.S.C. §§ 1961-68 (1994)?

LIST OF PARTIES TO THE PROCEEDING

Petitioner Bradley S. Logan, MD, was the plaintiff in the District Court of the Middle District of the State of Tennessee, and the Appellant to the Sixth Circuit Court of Appeals.

Respondents HCA, Inc., St. Petersburg General Hospital, Crockett Hospital, LLC, Lifepoint Hospitals Inc., HTI Memorial Hospital Corporation, d.b.a. Skyline Medical Center, Dr. David Desper, Dan Friedrich, Dr. Akshay Desai, Dr. George Banks, Rosemary Northrup-Bloomfield, Columbia Pinellas, Inc., now merged with Health Services (Delaware), Daneil McAuliffe, Ogden & Sullivan, P.C., Dr. Virgil Crowder, Jack Buck, Marjorie Nix, Dr. Penny Mediate, Robert Klein, Dr. Gregory Neal, Dr. David McKee, Dr. Lloyd Walwyn, Kelly Duggan, C.J. Gideon, Brandy Burnette, Gideon and Wiseman, LLC, Neil Kunkel, Andrew Naylor, Waller, Lansden, Dortch, & Davis, LLC, Steven Riley, Amy Kurzweg, and Bowen Riley Warnock & Jacobson, LLC, were the Defendants in the District Court of the Middle District of the State of Tennessee, and Appellees to the Sixth Circuit Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

LIST OF PARTIES TO THE PROCEEDINGS.....ii

TABLE OF AUTHORITIES.....v

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE PETITION.....5

1. **Peer review committees operate under color of state law. The results of peer review activities, especially when reported to the National Practitioner Databank (NPDB), can affect the liberty and property rights of physicians to practice their profession. Abuse of peer review can prevent good physicians from practicing, thereby harming the very patients peer review should protect.....6**

2. **The right of private action under HCQIA is an issue of first impression for this Court. An erroneous holding by the Sixth Circuit Court of Appeals that HCQIA was enacted to benefit patients only, but not to benefit those who**

provide them care (physicians), is oxymoronic. The Sixth Circuit Court of Appeals ignored that Act's recitation of benefits for physicians, which protects patients, by ignoring the statutory provisions of HCQIA that articulate due process rights to the physicians under review, making physicians beneficiaries of the law's provisions. The holding of the Sixth Circuit slights Constitutional affirmations of due process, privileges and immunities. If upheld, a circumstance in which the benefit to one group (patients), is supposedly advanced to the detriment of the acknowledged and articulated (in the same statute) constitutional rights of the benefit providers (physicians), then a wanton violation of fundamental fairness is upheld.....14

3. **The Sixth Circuit Court of Appeals erroneously interpreted the definition of enterprise in civil RICO and must be reversed.....20**

TABLE OF AUTHORITIES

Cases *Page*

Adickes v. S.H. Dress & Co.
398 U.S. 144, 152 (1970).....9

Alfredson v Lewisburg Community Hosp.
1989 Tenn App Lexis 746; 1989 WL134739
(Tenn Ct App).....13

Bell v. Burson,
402 U.S. 535 (1971).....10

Bivens v Six Unknown Fed. Narcotics Agents
403 U.S. 388 (1971).....17

Blum v. Yaretsky,
457 U.S. 991 (1982).....7

Bok v. Mutual Assurance, Inc.,
119 F.3d 927, 928-29 (11th Cir. 1997).....16

Brentwood Academy v. Tennessee Secondary School
Athletic Association, 531 U.S. 288 (2001).....6, 7

Bryan v. James E. Holmes Regional Medical Center
33 F.3d 1318 (11th Circuit 1994).....19

Burton v. Wilmington Parking Authority,
365 U.S. 715, 81 S.Ct. 856 (1961).....8

Cort v Ash,
422 U.S. 66 (1975).....16. 17

Dent v. West Virginia,
129 U.S. 114 (1889).....18

Feyz v. Mercy Memorial Hospital, et.al.,
264 Mich App 699; 692 NW2d 416 (2005).....12, 13

Greisman v. Newcomb Hosp.,
40 NJ 389, 192 A2d 817 (1963).....11

Hancock v. Blue Cross-Blue Shield of Kan.,
Inc., 21 F.3d 373, 374-75 (10th Cir.1994).....16

Kiester v. Humana Hospital Alaska, et al, 843 P2d 1219
(Alaska S. Ct. 1991).....12

Jackson v. Metro. Edison Co.,
419 U.S. 345, 350 (1974).....6

Lewisburg Community Hosp v. Alfredson,
805 SW2d 756, 759 (1991).....13

Marbury v. Madison,
1 Cranch 137 163 (1803).....17

Meyer v. Nebraska,
262 U.S. 390 (1923).....16

Miller v. Eisenhower Medical Center,
614 P.2d 258 (Cal 1980).....11

Monroe v. Pape,
365 U.S., at 172.....9

Nicholas v. North Colorado Medical Center, Inc.,
902 P.2d at 466.....9, 19

Northeast Georgia Radiological Associates, PC, v. Tidwell, et.al.,
607 F.2d 507 at p. 511.....11

Parratt v. Taylor,
451 U.S. 527, 101, S.Ct.1908, 1913,
68 L.Ed.2d 42 (1981).....9

United States v. Kragness,
830 F.2d 842, 856 (8th Cir. 1987).....21

United States v. Turkette,
452 U.S. 576, 583 (1981).....21

Wayne v Genesis Med. Ctr.,
140F.3d 1145, 1148 (8th Cir. 1998).....15,16

Woodard v. Porter Hospital,
125 Vt 419, 217 A2d 37 (1966).....11

Yick Wo v. Hopkins,
118 U.S. 356; 6 S. Ct. 1064; 30 L. Ed. 220; 1886 U.S. LEXIS 1938.....19

Yurko v. Corteret County General Hospital Corp.,
No. 82-2068, 4th Cir., (1983), unpublished.....11

Statutes *Page*

28 U.S.C. 1254.....1

42 U.S.C. 1101 et seq Health Care Quality Improvement Act of 1986..
..... i, ii, iv, 1, 2, 3, 4, 5, 8, 9, 14, 15, 16, 19, 20, 21

United States Constitution,
Fourteenth Amendment.....1

42 U.S.C. § 1983.....2

18 U.S.C § 1961 et seq (Racketeer Influenced and Corrupt Organizations Act).....3, 5, 20, 24 26

Tennessee Peer Review Law
(TPRL) TCA 63-6-219.....3, 8, 9, 10, 14

Florida Peer Review Law
Title XXIX, 395.0193.....3

PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully petitions this Court for a Writ of Certiorari to review the decisions of the Court of Appeals for the Sixth Circuit dated October 5, 2006 in this matter.

OPINIONS BELOW

The Report and Recommendation of the Magistrate Court is attached here as Appendix 1, the opinion of the District Court is attached as Appendix 2 and the opinion of the Court of Appeals for the Sixth Circuit is attached as Appendix 3.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Order on October 5, 2006. Jurisdiction of the United States Supreme Court in this matter is established by 28 U.S.C § 1254 (1). This case was first heard as a federal question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The protections provided by the 14th Amendment to the U.S. Constitution underlie the issues for federal claims resulting from violations of the statutory provisions of due process outlined in the Health Care Quality Improvement Act of 1986 ("HCQIA"), as well as the deprivation of liberty and property rights occurring by to failure to provide due process in violation of 42 U.S.C. §1983.

Section 1 of the Fourteenth Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §.1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 1101 et seq The Health Care Quality Improvement Act (HCQIA) is attached here as Appendix 4.

Civil violations of 18 U.S.C. § 1964, the Racketeering Influenced Corrupt Organizations Act ("RICO") are also involved, and the statute is attached here as Appendix 5.

The Tennessee Peer Review Law TCA 63-6-219 is at Appendix 6, The Florida Peer Review statute Title XXIX, 395.0193 is at Appendix 7.

STATEMENT OF THE CASE

The American Medical Association estimates that, in 2006, there were roughly 850,000 physicians in the United States. All of those individuals have their professional activities relating to patient care available for review by peer review bodies ostensibly in an effort to safeguard patients' safety and quality medical care. HCQIA was enacted with various provisions of qualified immunity for those performing, in good faith, the reviews as well as certain procedural safeguards for the physicians being reviewed. There are hundreds of thousands of peer review activities occurring each year, which affect not only the practicing physician, but the patients he or she may serve. This case shows the system of peer review is subject to egregious abuse.

This case had its inception with the violation of Petitioner's constitutional, statutory and common law rights by those engaging in and concealing an enterprise to abuse the physician peer review process, with repercussions extending to reports to national and state agencies, to deprive the petitioner, a physician, inter alia, of due process and ultimately liberty and property rights to the detriment of patients.

Statement of Facts

The Petitioner is an obstetrician/gynecologist who began practicing in the Tampa Bay, Florida, area in 1993. In 1997 he became the target of the enterprise through a sham peer review proceeding at St. Petersburg General Hospital. While being reassured by the hospital that the review was not an investigation but merely a normal review of charts, he resigned his privileges and moved to Lawrenceburg, Tennessee, where he began work at Crockett Hospital. When, previous assurances aside, St. Petersburg General Hospital filed a false entry into the NPDB stating the petitioner resigned while under investigation, Crockett Hospital, now aware of the alleged "resignation while under investigation", through dissemination of a HCQIA mandated NPDB report, through staff and agents and with other participants in the enterprise, exploited an opportunity to threaten and harass Petitioner by launching a review of his charts at Crockett.

In 2001, the Petitioner negotiated a Recruiting Agreement with Skyline Medical Center in Nashville. During the credentialing process, Skyline contacted none of the references listed on the petitioner's application, but conducted 'off the record' phone calls to persons in St. Petersburg and Lawrenceburg. Prior to the Credential Committee of Skyline Medical Center meeting in February, 2002, Skyline rescinded its Agreement with the petitioner. He nonetheless appeared before the Credentials Committee to allow for questions and clarification of his record, but encountered an unfavorable response and withdrew his application for privileges upon advice of counsel. After attempting to clarify 'concerns' with the hospital, the petitioner submitted a second application for privileges, which was denied in January 2003. A hearing was conducted

in May 2003. The petitioner was denied a list of charges with sufficient specificity to allow response, a requirement of both HCQIA, the hospital bylaws and fundamental due process. The petitioner withdrew his second application after receiving an unfavorable response from the hearing committee. Despite the petitioner's withdrawal of his application for privileges, Skyline placed a false entry into the NPDB in September 2003, stating the petitioner was denied privileges, which entry has completely precluded the petitioner's ability to practice medicine as a surgeon.

In January 2005 the petitioner filed the instant case in federal court, alleging fraudulent misrepresentation, suppression, conspiracy, negligence, wantonness, breach of contract, abuse of process, and violations of HCQIA, RICO, and 42 U.S.C. § 1983.

Course of Proceedings

Soon after the case was filed, the Respondents filed Motions to Dismiss. Oral arguments were heard by a Magistrate Judge in April 2005. In May 2005 the Magistrate Judge entered his Report and Recommendations, advocating dismissal of all charges, based upon "failure to state a claim upon which relief can be granted" which was followed by responses from both the petitioner and respondents. The Chief Judge then entered an Order overruling the petitioner's objections and adopting the recommendations of the Magistrate Judge's Report and Recommendations on November 30, 2005. A timely Appeal was filed by the petitioner, on December 30, 2005. The Sixth Circuit Court of Appeals entered its Order on October 5, 2006, sustaining the rulings of the lower court.

REASONS FOR GRANTING THE PETITION

Over 850,00 physicians caring for 300,000,000 citizens are subject to peer review in their state of residence. Abuse of the system is rampant.

1. **Peer review committees operate under color of state law. The results of peer review activities, especially when reported to the National Practitioner Databank (NPDB), can affect the liberty and property rights of physicians to practice their profession. Abuse of peer review can prevent good physicians from practicing, thereby harming the very patients peer review should protect.**

The Sixth Circuit Court of Appeals erred in its judgment that the Appellant failed to state a 42 U.S.C. § 1983 claim upon which relief can be granted by stating "The actions [of the Respondents] are in no way affiliated with the state so as to subject the defendants to § 1983 liability."

The Sixth Circuit cites Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974) as justification for its ruling in the instant case. However, in doing so, the Sixth Circuit empties the meaning of this Court's ruling in Brentwood Academy v. Tennesse Seconday School Athletic Association, 531 U.S. 288 (2001), and did so without setting forth any standard for making its pronouncement.

In fact, and most importantly, a plain reading of U.S.C. § 1983 reveals:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured..."

There is no statutory requirement that the action be that of the state, but rather that the activity was merely under color of a statute (as in this case) or other practice enumerated.

However, if arguendo, there is a requirement of state action, in this case there is such a close nexus between the state and the challenged action, with no offsetting reason to see the acts of the respondents in any other way, that the actions of the respondents assumed the color of state law and were state actions. In this case it is clear the actions were those of the state, as the state, and the state in conjunction with federal law, authorized and required peer review activities. Such activity was performed through peer review committees entwined with the state.

This Court, in Brentwood Academy v. Tennessee Secondary School Athletic Association, (supra), spoke to state action through entwinement:

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power..." (quoting Blum v. Yaretsky, 457 U.S. 991 (1982) "...the facts justify a conclusion of state action under the criterion of entwinement, a conclusion in no sense unsettled merely because other criteria of state action may not be satisfied by the same factors."

Under the Tennessee Peer Review Law, the state has, by reciprocity in authority and protection, entwined itself with hospitals, members of peer review committees, and those reporting to peer review committees, for the responsibility of peer review activity, and has set standards for its performance and reporting, has provided qualified immunity for its participants acting in their official capacities (a power certainly reserved to the state itself) when actions are compliant with its provisions and by reference those of HCQIA, has mandated reporting to a national databank, while prohibiting others from reporting to the databank, and has imposed penalties on participants who fail to report their findings to the NPDB. Every hospital in the state of Tennessee has, by law, a peer review committee.

The same is true for Florida. Its statute clearly mandates and commands peer review:

> It is the intent of the Legislature that good faith participants in the process of investigating and disciplining physicians pursuant to the state-mandated peer review process...
>
> Each licensed facility, as a condition of licensure, shall provide for peer review of physicians

This court has found that a state and an ostensibly private entity may be so interdependent that state action will be found from their symbiotic relationship alone. See Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856 (1961) (finding state action based on lease relationship that benefited and obligated both parties).

The Colorado Supreme Court, although analyzing its own state's statute, has addressed the issue of peer review participants being state actors directly:

> "...when it is performing peer review activities the governing board of a hospital is 'clothed with the status of a state agency." Nicholas v. North Colorado Medical Center, Inc.,supra, 902 P.2d at 466.

The National Practitioner Data Bank was created by HCQIA, a federal statute; its entries are provided by hospital and other peer review committees operating under color, authority, and qualified immunity granted by state laws such as the Tennessee Peer Review Law, which directly references HCQIA, in performance of their duties. The peer review participants are indeed "clothed with the status of a state agency" through symbiosis and entwinement.

Further, as stated in West v Atkins, 487 U.S. 42 (1988):

> It is firmly established that a defendant in a 1983 suit acts under color of state law when he abuses the position given to him by the State. See Monroe v. Pape, 365 U.S., at 172. Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law. See, e.g. Parratt v. Taylor, 451 U.S., at 535-536; Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). See also Flagg Bros., Inc, v. Brooks, 436 U.S., at 157, n. 5.

West v. Atkins (supra) held that a physician employed to do work for the state was a state actor.

> A physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts 'under color of state law,' within the meaning of 1983....
> It is the physician's function within the state system, not the precise terms of his employment, that is determinative.

Similarly, physician peer review committees are doing work mandated by the Tennessee Peer Review Law for the state and are state actors.

Property was deprived from the Petitioner. He lost a contract. He lost his ability to fully practice his profession. This court has recognized that a driver's license "is often involved in the livelihood of a person and as such could not be summarily taken without a prior hearing." Bell v. Burson, 402 U.S. 535 (1971). Further, in that case this court held "In all of these cases, deprivations of property were authorized by an established state procedure and due process was held to require pre-deprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur." More than a driver's license, the Petitioner lost his ability to practice his profession. The state procedure in this case is contained in the Tennessee Peer Review Law (TPRL) TCA 63-6-219(b)(1):

> (1) In conjunction with the applicable policies of the Health Care Quality Improvement Act of 1986 (42 U.S.C. §§ 11101-11152), it is the stated policy of Tennessee to encourage committees made up of Tennessee's licensed physicians to candidly, conscientiously, and objectively evaluate and review their peer's professional

conduct, competence, and ability to practice medicine.

The ability to practice one's profession has been recognized as a liberty and property right by numerous legal authorities. "Medical staff privileges embody such a valuable property interest that notice and hearing should be held prior to its termination or withdrawal, absent some extraordinary situation where a valid government or medical interest is at stake." Northeast Georgia Radiological Associates, PC v. Tidwell, et al, 607 F 2d 507 at p. 511. "The clinical privileges alleged by petitioners' complaint are sufficiently analogous to a physician's staff privilege to make out a colorable claim to a property interest under the due process clause." In Yurko v. Corteret County General Hospital Corp. No. 82-2068, 4th Cir., (1983) Unpublished.

The seminal case recognizing a right to judicial review of private hospital exclusion decisions is Greisman v. Newcomb Hosp, 40 NJ 389, 192 A2d 817 (1963), in which the court reasoned that even private hospitals are sufficiently involved [entwined] with the public interest to warrant judicial intervention in their affairs on public policy grounds, just as other ostensibly private enterprises, like innkeeping, traditionally have been subject to government regulation. Viewing a private hospital's power to grant or withhold staff privileges as fiduciary in nature, the Greisman court ruled that private hospital exclusion decisions could be judicially reviewed to ensure that the decisions were made in compliance with hospital bylaws, for reasons related to sound hospital standards in furtherance of the common good, and not on an arbitrary, capricious, or unreasonable basis. A subsequent body of law supports this position (*see also* Hawkins v. Kinsie, 540 P2d 345 (Colo 1975), Woodard v. Porter Hospital, 125 Vt 419, 217 A2d 37 (1966), Miller v.

Eisenhower Medical Center, 614 P.2d 258 (Cal 1980), and Kiester v. Humana Hospital Alaska, et al, 843 P2d 1219 (Alaska S. Ct. 1991).

Of more recent vintage is Feyz v. Mercy Memorial Hospital, et. al., 264 Mich App 699;692 NW2d 416 (2005). This case also involved a § 1983 claim, noted as a "federal civil rights claim" by the Michigan Court of Appeals hearing the case (upheld by the Michigan Supreme Court). That Court found, in reviewing the activities of a peer review committee:

> "It is not within the scope of a peer review committee to violate someone's civil rights. There is no indication in the various civil rights acts at issue here that peer review committees were excluded from the scope of those acts, nor is there any indication that the peer review statute intended to exclude peer review committees from compliance with the various civil rights acts. Indeed, the fact that immunity under the peer review statute is reflected by the fact the (paragraph) 4 denies immunity to a person, organization, or entity that acts with malice.
>
> Which brings us to the second reason, namely, that we view a violation of a Civil rights act as being a malicious act. The following portion of the definition of "malice" from Black's Law Dictionary (5th ed) is particularly apt in this situation: "Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen." The various civil rights acts adopted by the state Legislature and the United States Congress establish the legal rights of the citizens, including petitioner. If Defendants acted in disregard of those rights, doing so represents a malicious Act,

> and, therefore, is outside the scope of immunity granted by the peer review statute.

and the Michigan Court of Appeals also stated:

> while a private hospital is not subject to the same scrutiny as a public employer in terms of whether the constitutional rights of its employees were violated, the doctrine does not create any greater insulation from scrutiny than that enjoyed by any other private employer...Private hospitals do not have carte blanche to violate the public policy of our state as contained in its laws.

The Michigan Court of Appeals in the Feyz decision then quotes from a decision by the Tennessee Supreme Court in Lewisburg Community Hosp v. Alfredson, 805 SW2d 756 759 (1991):

> We conclude that Hospital staffing decision involving specialized medical and business considerations are entitled to deference from the courts; however, in the words of the Court of Appeals:
>
> "Like any other legal entity, hospitals are capable of breaching contracts, committing torts, or violating others' constitutional or statutory rights. When they do, they are no less subject to the courts' jurisdiction than anyone else." (Alfredson v Lewisburg Community Hosp, 1989 Tenn App Lexis 746; 1989 WL134739 Tenn Ct App)

Therefore, because the participants in peer review proceedings act under color of state law; because their

actions are entwined with governmental authorities by virtue of reporting requirements to the NPDB mandated by statute, by the protection offered under the state law, and by the reporting requirements demanded by TPRL; because the reports required by state law and federal law to the NPDB affect property rights, as did the actions in the instant case which resulted in the rescinding of the Recruiting Agreement; because private hospitals are subject to the court's jurisdiction when violating constitutional and statutory rights, and because it is not within the scope of a peer review committee to violate someone's civil rights, the Sixth Circuit Court of Appeals erred in stating that the petitioner had failed to state a Section 1983 claim upon which relief could be granted. The Court of Appeals' decision should be reversed and the case remanded to the district court for further discovery and trial.

2. **The right of private action under HCQIA is an issue of first impression for this Court. An erroneous holding by the Sixth Circuit Court of Appeals that HCQIA was enacted to benefit patients only, but not to benefit those who provide them care (physicians), is oxymoronic. The Sixth Circuit Court of Appeals ignored that Act's recitation of benefits for physicians, which protects patients, by ignoring the statutory provisions of HCQIA that articulate due process rights to the physicians under review, making physicians beneficiaries of the law's provisions. The holding of the Sixth Circuit slights Constitutional affirmations of due process, privileges and immunities. If upheld, a circumstance in which the benefit to one group (patients), is supposedly advanced**

to the detriment of the acknowledged and articulated (in the same statute) constitutional rights of the benefit providers (physicians), then a wanton violation of fundamental fairness is also upheld.

The Sixth Circuit Court of Appeals holds that HCQIA was enacted to benefit professional medical review bodies and patients, not an aggrieved physician, but offers very little actual judicial comment on this topic, other than to say other circuits have found against a private right for action under HCQIA.

The petitioner is, in this case, claiming that he was injured when his due process rights were unconstitutionally denied during peer review proceedings, in violation of HCQIA, and that subsequent injurious falsehoods were perpetrated resulting in deprivation of liberty and property. Because the federal government had no intention of creating a private system that would operate outside the constitution and deprive physicians of due process rights, lawmakers went to great lengths to codify the minimum requirements for due process in HCQIA and went beyond those requirements, recognizing the individuality of circumstances, to require "other procedures as are fair to the physician under the circumstances."

While Wayne v Genesis Medical Center, 140 F.3d 1145, 1148 (8th cir. 1998) states "nothing in HCQIA's explicit language or legislative history otherwise signals an intent to create a cause of action for aggrieved physicians," Petitioner, in this circumstance, is not arguing that a cause of action was created by HCQIA, but that those self-evident rights are guaranteed by the constitution, and that violation of the due process components of the statute must provide for redress

for the physician affected, or be unconstitutional. Due process rights and attendant causes of action were preserved by the authors of HCQIA who, in great detail, enumerated what due process in HCQIA is. Were these provisions not made, the potential deprivation of liberty and property by entries into the NPDB would render HCQIA unconstitutional as in Meyer v. Nebraska, 262 U.S. 390 (1923). Protection against such deprivation without due process is provided by the Fifth and Fourteenth Amendments and by the principle of fundamental fairness. No legislator or jurist wishes to send a class of citizens to the "back of the bus" by claiming they are denied constitutional protection because a federal statute supercedes the US Constitution.

Further Wayne v Genesis Med. Ctr., 140F.3d 1145, 1148 (8th Cir. 1998), Bok v. Mutual Assurance, Inc., 119 F.3d 927, 928-29 (11th Cir. 1997), Hancock v. Blue Cross-Blue Shield of Kan., Inc., 21 F.3d 373, 374-75 (10th Cir.1994), cited by the Sixth Circuit, all derive from Cort v Ash 422 U.S. 66 (1975). It is the misapplication of this court's findings in Cort v. Ash (supra) that has led to the Sixth Circuit and others holding "that HCQIA does not create a private right of action.'

Cort v. Ash (supra) was based on 18 U.S.C. 610, a criminal statute prohibiting corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors... are to be voted for." It was a case involving suit by the shareholder of a corporation.

The court laid certain criteria for determining whether a private remedy is implicit in a statue not expressly providing one. However, it is clear from the entire commentary that the court was explicitly considering the private remedies

available to those basing their claims upon a criminal statute. Cort v. Ash (supra) is also distinctive in that it was an action brought by a shareholder of a corporation, not an individual directly affected by alleged violations of a statute.

More instructive in the instant case is Bivens v Six Unknown Fed. Narcotics Agents 403 U.S. 388 (1971) cited in Cort v. Ash (supra) in which this Court addressed the issue of whether a plaintiff injured by the violation of his Constitutional rights was entitled to redress his injury. This Court held:

> The question is merely whether petitioner, if he can demonstrate an injury consequent upon violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts...The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. Marbury v. Madison, 1 Cranch 137, 163 (1803).

And this court clearly stated in Court v. Ash (supra):

> Section 610 was primarily concerned, not with the internal relations between corporations and stockholders, but with corporations as a source of aggregated wealth and therefore of potential corrupting influence; thus this statute differs from other criminal statutes in which private causes of action have been inferred because of a clearly articulated federal right in the plaintiff, e. g., Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, or a pervasive legislative scheme governing the

relationship between the plaintiff's class and the defendant's class in a particular regard.

The principles of fundamental fairness underlying these matters have been understood by this court for over a century. This court, in Dent v. West Virginia 129 U.S. 114 (1889), stated well the necessity of provision for due process during the exertion of power (in this case, one of the first peer review proceedings):

> As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms "due process of law" a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to "the law of the land." In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters: that is, by process or proceedings adapted to the nature of the case. The great purpose of the

requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen. As said by this court in *Yick Wo v. Hopkins*, speaking by Mr. Justice Matthews:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." 118 U.S. 356, 369. See, also, *Pennoyer v. Neff*, 95 U.S. 714, 733; *Davidson v. New Orleans*, 96 U.S. 97, 104, 107; *Hurtado v. California*, 110 U.S. 516; *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 519.

Other courts, when confronted with the issue of a private right of action under HCQIA, have made decisions which support the protection of due process and fundamental fairness, such as in Nicholas v. North Colorado Medical Center, Inc., 902 P.2d at 466:

> The standard for summary judgment under HCQIA is whether a reasonable jury, viewing the facts in the best light for the plaintiff, might conclude that the plaintiff has shown by a preponderance of the evidence that a defendant's actions are outside the scope of 42 U.S.C. 1112(a). Any disputed facts must be sent to the jury as special interrogatories. Quoting Bryan v. James E. Holmes Regional Medical Center 33 F.3d 1318 (11th Circuit 1994).

The right to liberty and property in this case is fundamental. However, even if it were considered arguendo a non-fundamental right, there is no compelling state interest that can be invoked that would justify the denial of due process protections enshrined in HCQIA.

To posit that a law could be created that would advance the rights of one group of individuals (in this case, patients), even to the exclusion of rights recognized and articulated in the very statute in question, at the expense of another group (physicians) is to deny the requirement of fundamental fairness, and to neglect the due process requirements enshrined in the Constitution and in HCQIA itself. Thus, the Court of Appeals has erred, its decision should be reversed, and the case remanded for further discovery and trial.

3. The Sixth Circuit Court of Appeals erroneously interpreted the definition of enterprise in civil RICO and must be reversed.

With a sweeping and terse statement the Sixth Circuit Court of Appeals dismissed the petitioner's RICO claim stating: "

> Logan's allegations do not establish that the defendants formed an enterprise as defined by RICO. Accordingly, Logan did not state a RICO violation against the defendants.

The Sixth Circuit opined:

> RICO defines an enterprise as "include[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of

individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). The existence of an enterprise is shown "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981). "Continuity of structure exists where there is an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuing, rather than ad hoc basis." United States v. Kragness, 830 F.2d 842, 856 (8th Cir. 1987).

In Count Eight of the Complaint petitioner defined the members of the enterprise by naming the individuals and corporations and the group of individuals, corporations associated in fact that constitute the enterprise.

The Plaintiff re-alleges and reasserts each and every allegation in the Complaint and Appendix, including damages listed in all Counts.

1. The Defendants were a group of corporations and persons associated together both formally and informally who were engaged in a common enterprise or course of conduct that involved conspiring to willfully, wantonly, fraudulently and/or negligently misrepresent facts surrounding the Plaintiff, and/or his clinical competence, and/or his application for or resignation of privileges, and/or his character as well as to effect breach of contract, abuse of process, to violate HCQIA and to publish stigmatizing statements. HCA is a corporation which, in the year 2003, had revenues of more than $20 billion and an

> adjusted profit of $2.4 billion. HCA is the parent organization for St. Pete General, Lifepoint, Crockett, TriStar, and Skyline, and as such provides a systematic linkage and a system of authority that can provide a continuing mechanism for directing the group's affairs and those of their employees and agents. These employees and agents both knowingly made and implemented decisions. On information and belief, by frequent and continuous communications among, and coordinated activities of, the Defendants and others constituted and continue to constitute an association-in-fact enterprise as defined in 18 U.S.C. 1961(4).

The petitioner then claimed "the existence of an enterprise is shown "by evidence of an ongoing organization, formal or informal", by stating in the claim:

> 1. The Defendants each, separately and severally, as well as in concert, participated in the common enterprise and used mail, email, phones, faxes, and other means of communication that crossed state lines and geographic boundaries to execute the scheme, indictable under Title 18, U.S.C 1341 and 1343. Specific instances are set forth, but not limited to, those in the Complaint and in the Appendix, which are incorporated by reference and re-alleged as if fully set forth herein.
>
> 2. From at least January 1997 up to and including the date of filing this complaint, the Defendants, being persons employed by and associated with the enterprise described above, did unlawfully,

knowingly, wantonly, and intentionally combine, conspire, confederate, and agree together with each other to conduct and participate, directly and indirectly, in the conduct of the affairs of the aforementioned enterprise through a pattern of racketeering as defined in 18 U.S.C. 1961, and as described in the Complaint and Appendix, which are incorporated by reference and re-alleged as if set out here in full, and the Plaintiff was damaged as a result. The instances of mail fraud and wire fraud alleged in the Appendix are here re-alleged as part of the racketeering acts. All these acts have been the proximate cause of false entries and stigmatizing statements into the NPDB and AHCA, breach of contracts, diminishment of professional reputation and inability to practice his profession, loss of business opportunity, financial loss, legal expenses, pain and suffering, and consequential damages.

1. Defendants HCA, St. Pete General, Lifepoint, Crockett, TriStar, and Skyline are entities who directly engage in interstate commerce by virtue of serving nonresident patients, by receiving Medicaid and Medicare payments, and by making reports on peer review activities that cross state lines. Their actions also have an indirect effect on interstate commerce by impacting their victim, in this case the Plaintiff. These defendants were engaged in a pattern of racketeering activity that affected interstate commerce, and the Plaintiff was damaged as a result.

Defendants Friedrich, Northrup-Blooomfield, Buck, Nix, Klein, Kunkel, and Duggan are employees of the corporate Defendants named above, and they were engaged in a pattern of racketeering activity as

defined in 18 U.S.C. 1962, et seq., and described in the Complaint and the Appendix and here realleged as if set out in full, and the plaintiff was damaged as a result by diminishment of professional reputation and inability to practice his profession, loss of business opportunity, financial loss, legal expenses, pain and suffering, and consequential damage.

Defendants Desper, Banks, DeSai, the MEC of St. Pete General, Columbia-Pinellas, Crowder, Mediate, the MEC of Crockett Hospital, Neal, McKee, Walwyn, the individuals of the MEC, Hearing Committee and Board of Trustees of Skyline, McAuliffe, Gideon, Burnette, Naylor, Riley, Kurzweg, Ogden& Sullivan, Gideon & Wiseman, Waller Lansden, Bowen Riley, individually and/or collectively, are agents of the above-named defendants, and were engaged in a pattern of racketeering activity as defined in 18 U.S.C. 1962 et seq. and described in the Complaint and the Appendix.

Petitioner further outlined the continuity of the enterprise by naming the RICO activities and their course over time:

INCIDENTS OF MAIL FRAUD — including, but not limited to:

Letter from Dr. Desper to Dr. Logan, 1/16/97
Letter from Chairman, OB/GYN Dept., St. Pete General, to Chief of Staff, 1/20/97
Letter from Dr. Banks to Dr. Logan, 2/6/97
NPDB report for St. Pete General, 10/15/97

Letter to Florida Agency for Healthcare Administration, October 15, 1997
Letter from Marjorie Nix to Dr. Logan, 9/30/97
Letter from Kelly Duggan to Dr. Logan, 2/20/2002
Letter from Neil Kunkel to Dr. Logan, 3/20/2002
Letter from Kelly Duggan, 5/17/2002
Letters from Dr. McKee to Dr. Logan and Dr. Huckaby, 12/4/2002
Letter from Robert Klein to Dr. Logan, 1/10/03
Letter from CJ Gideon to Dr. Crowder, 2/6/03
Letter from Dr. Logan to CJ Gideon, 4/11/2003
Letter from CJ Gideon to Dr. Logan, 4/16/03
Letter from Dr. Logan to CJ Gideon, 4/22/03
Letter and Request for Documents from Dr. Logan to CJ Gideon, 4/25/03
Peer Review Documents from St. Pete General, sent to CJ Gideon, 4/24/03
Letter from CJ Gideon to Dr. Logan, 4/28/03
Letter from Dr. Logan to Dr. Walwyn, 6/9/03
Letter from Dr. Walwyn to Dr. Logan, 6/10/03
Letter from Ms. Northrup-Bloomfield to NPDB, 6/27/03
Letter from Robert Klein to Dr. Logan, 7/8/03
Letter from Dr. Logan to Mr. Klein, 7/10/03
Letter from Mr. Klein to Dr. Logan, 8/28/03
NPDB report from Skyline, 9/2/03

INCIDENTS OF WIRE FRAUD —including, but not limited to:

Fall, 2001—Robert Klein to Jack Buck, telephone call
Fall, 2001—representative or agent of Skyline to University of Calgary, telephone call

December, 2001—Neal to physicians in Florida and Tennessee, approximately 7 telephone calls

Throughout the length and breadth of the complaint petitioner demonstrated "Continuity of structure exists where there is an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuing, rather than ad hoc basis" and in particular outlined the command and control structure in the complaint by stating it clearly in item 41 (pages 25-26), item 61 (page 32), item 62 (page 32), item 64 (page 32), item 67 (page 34), Item 69 (page 34), item 64 (page 32),Item 71 (page 35) and others of the complaint.

The issues at hand with respect to the establishment of an enterprise are issues of fact to be determined by a jury. Because the Appeals Court of the Sixth Circuit erred in its application of the enterprise requirement of RICO, as provided by this court, its ruling must be reversed so that the matter can return to the district court for further discovery and trial.

Respectfully submitted,

Bradley S. Logan, MD
Counsel Pro Se
2202 N West Shore Blvd
Suite 200
Tampa, FL 33607
813-333-1516

Appendix 1

Report and Recommendation of the
United States Magistrate Judge
United States District Court
Middle District of Tennessee
Nashville Division

Case: 3:05-cv-00006
Bradley S. Logan
P O Box 129
Goodlettsville, TN 37070

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
BRADLEY S. LOGAN, M.D.
Plaintiff,
HCA, INC., ET AI..
Defendants.

No. 3:05-0006
Echols/Brown

To: Honorable Robert L. Echols, Chief District Judge

REPORT AND RECOMMENDATION

By an order (Docket Entry No. 2) entered January 18, 2005, the Court referred this action to the Magistrate Judge "for consideration of all pretrial matters. Any dispositive motions filed shall be considered by the Magistrate Judge, who shall submit proposed findings of fact and recommendations for disposition."

Presently pending before the Court are Motions to Dismiss from the defendants (Docket Entry Nos. 37, 45, 47, 49, 56 and 61), a Motion to Strike from the defendants (Docket Entry No.40), plaintiff's Response to the Motion to Strike (Docket Entry No. 55), his Response to each Motion to Dismiss (Docket Entry Nos. 63, 64, 65, 70, 72 and 83), and Replies from the defendants in support of their Motions to Dismiss (Docket Entry No. 77, 78 and 80).

A hearing was held on April 12, 2005 to address the defendants' dispositive motions (Docket Entry No. 81). The undersigned has considered the arguments of counsel, the motions presently pending and the record in this case. For the reasons stated below, it is respectfully

This document was entered o the docket in compliance with
Rule 58 and/or Rule 79(a)
FRCP, on 5/23/05 By KM

recommended that the defendants' Motions to Dismiss be granted and that this action should be dismissed. Should the Court adopt this recommendation, it is further recommended that the defendants' Motion to Strike be denied as moot.

BACKGROUND

The plaintiff proceeding *pro se*, is a physician (OB/GYN) residing in Goodlettsville, Tennessee. In August, 1997, he was a member of the medical staff at the St. Petersburg General Hospital in St. Petersburg, Florida. He resigned his position there because of a dispute arising over his care of certain patients.[1] An administrator at the

hospital notified the National Practitioner Data Bank (NPDB) and the Florida Agency for Health Care Administration (AHCA) that the plaintiff had resigned "while under investigation". Docket Entry No. 1 at pgs. 13-14.

Following his resignation, the plaintiff moved to Lawrenceburg, Tennessee where he began a practice at Crockett General Hospital. Docket Entry No. 1 at pg. 16. Citing economic pressures and the refusal of Crockett administrators to address those pressures, the plaintiff left his practice at Crockett effective January, 2002. Docket Entry No. 1 at pgs. 21-22. Before leaving, though, the plaintiff had already applied for clinical privileges at the Skyline Medical Center in Nashville. Docket Entry No. 1 at pg. 23.

In November, 2001, he executed a Recruiting Agreement with Skyline. Docket Entry No. 1 at pg. 23. This agreement, however, was later rescinded because the plaintiff had failed to "commence the full-time practice of medicine in the Skyline community on or before January 1,

[1] During his practice in St. Petersburg, the plaintiff was a member and owner of Group Medica of Florida. This professional association apparently had a lease agreement for office space with Columbia-Pinellas, Inc., a subsidiary of the Hospital Corporation of America. For some reason, the lease agreement was breached and a judgment was entered against Group Medica of Florida. An effort was subsequently made in Tennessee to collect this judgment from the plaintiff. Docket Entry No. 1 at pg. 15.

2002." Docket Entry No. 1 at pg. 25. On February 28, 2002, the plaintiff met with the Credentials Committee at Skyline and learned that the committee would not recommend his application for privileges at the hospital. Shortly thereafter; the plaintiff withdrew his application for privileges. Docket Entry No. 1 at pg. 26.

Later that year, the plaintiff submitted a second application for privileges at Skyline. Docket Entry No. 1 at pg. 28. On July 7, 2003, the Medical Executive Committee at Skyline met and voted to deny plaintiff's second application for privileges at the hospital. Docket Entry No. 1 at pg. 50. Three days later, the plaintiff sent a letter to Skyline withdrawing his application for privileges. An administrator at Skyline subsequently notified the NPDB that the plaintiffs application for privileges had been denied rather than withdrawn. Docket Entry No. 1 at pg. 51.

II. THE COMPLAINT

On January 5, 2005, the plaintiff initiated this action with the filing of a complaint
Docket Entry No. 1).[2] In the complaint, the plaintiff alleges that he was harmed by various acts related to his employment at the St. Petersburg General Hospital and the Crockett General Hospital. He also claims that misconduct on the part of some defendants led to the improper denial of his application for privileges at the Skyline Medical Center.

More specifically, the plaintiff alleges ten general claims for relief. These claims are:

1) fraudulent misrepresentation,
2) suppression, [3]

3) conspiracy,
4) negligence,

---

[2] The plaintiff has described his 79 page complaint as "a testament to respect for judicial economy". Docket Entry No. 64 at pg. 10.

[3] Suppression is also referred to by the plaintiff as misrepresentation by concealment. Docket Entry No. 64 at pg. 15; Docket Entry No. 70 at pg. 19; Docket Entry No. 72 at pg.10.

5) wantonness, [4]
6) breach of contract,
7) abuse of process,
8) violations of 18 U.S.C. § 1961, et seq. (R.ICO),
9) the denial of due process and stigmatizing statements in violation of 42 U.S.C. § 1983, and
10) violations of the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101, et seq.

The plaintiff brings this action against the Hospital Corporation of America (HCA). The St. Petersburg defendants include Galen of Florida, Inc., d/b/a St. Petersburg General Hospital; Drs. David Desper, Akshay Desai and George Banks; Dan Friedrich, CEO of the St. Petersburg General Hospital; Rosemary Norhrup-Bloomfield, Director of Risk Management; Daneil McAuliffe, an attorney for the hospital; Ogden & Sullivan, a law firm in Tampa, Florida; Columbia-Pinellas, Inc.; Steven Riley and Amy Kurzweg, attorneys in Nashville; and the Nashville law firm of Bowen, Riley, Warlock & Jacobson.

The Crockett defendants include the Crockett General Hospital; Lifepoint Hospitals, Inc., which operates the Crockett General Hospital; Drs. Virgil Crowder and Penny Mediate; Jack Buck, CEO of the Crockett General Hospital; Marjorie Nix, a former Physician Recruiter for Crockett; Neil Kunkel and Andrew Naylor, Tennessee attorneys; and the Nashville law firm of Waller, Lansden, Dortch & Davis.

The Skyline defendants include HTI Memorial Hospital Corp., d/b/a Skyline Medical Center; the Tristar Health System; Drs. Gregory Neal, David McKee and Lloyd Walwyn; Robert Klein, CEO at Skyline; Kelly Duggan, Senior Operations Counsel for HCA; Clarence Gideon and Brandy Burette, attorneys in Nashville; and the Nashville law firm of Gideon & Wiseman.

---

[4] With respect to wantonness, the plaintiff describes it "as a common law tort action in
that it is not inconsistent with the Constitution of the United States, its laws, and institutions of the state." Docket Entry No. 70 at pg. 27.

III. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., is reviewed under the standard that dismissal is appropriate only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his alleged claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 102 (1957). In reviewing a motion to dismiss, the allegations in the plaintiff's complaint are liberally construed

and taken as true. Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976). More than bare assertions of legal conclusions, however, are required to withstand a Rule 12(b)(6) motion, and the complaint must contain allegations of fact sufficient to support the asserted legal claims.
See Scheid v. Fanny Farmer Candy Shops. Inc., 859 F.2d 434, 436-437 (6th Cir. 1988).

IV. ANALYSIS OF THE CLAIMS

The plaintiff asserts that the Court has federal question jurisdiction to adjudicate his claims. This jurisdiction rests on the viability of plaintiffs federal claims arising under 42 U.S.C. §1983; the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, et seq.; and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq.

A) Claims brought pursuant to 42 U.S.C. § 1983

To state a claim for relief under 42 U.S.C. § 1983, the plaintiff must plead and prove that the defendants, while acting under color of state law, deprived him of some right or privilege guaranteed by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981).

As noted above, a defendant in a § 1983 action must have acted "Under color of state law." Purely private conduct, no matter how discriminatory or wrongful, is not actionable under § 1983. American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40, 1 19 S.Ct. 977,

985, 143 L.Ed.2d 130 (1999). Here, the defendants are either persons or private entities with no direct authority to act on behalf of the State. Thus, the defendants in this case do not appear to have acted "under color of state law".

Nevertheless, state action may be found if a private party has (1) acted with the help of or in concert with state officials, (2) been delegated power traditionally exclusively reserved to the State, or (3) there is a sufficiently close nexus between the State and the challenged action of the private party so that the action of the latter may be fairly treated as that of the State itself. McKeesport Hospital v. Accreditation Council for Graduate Medical Education, 24 F.3d 519, 524 (3rd Cir. 1994). The underlying question, therefore, is whether the conduct of a private party is fairly attributable to the State. Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764, 2770, 73 L.Ed.2d 418 (1982).

The fact that a private person or entity performs a function which serves the public does not render its ants state action. Id, at 102 S.Ct. 2772. Nor does a business or profession perform state functions merely because it is subject to state regulation. American Manufacturers Mutual Insurance Co., supra at 119 S.Ct. 986. In this case, the plaintiff has offered no factual allegations that would seriously suggest that the defendants' actions are fairly attributable to either Florida or Tennessee. Therefore, he has failed to state a claim under § 1983 for which relief can be granted. See Crowder v. Conlan, 740 F.2d 447, 450 (6th Cir. 1984)(the decision by a private hospital to restrict staff privileges does not constitute state action).

B) Claims brought pursuant to 42 U.S.C. § 11101, et seq. (HCQIA)

In 1986, Congress made the following findings:

> 1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant

Page 6

> greater efforts than those that can be undertaken by any individual State.
>
> 2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.
>
> 3) This nationwide problem can be remedied through effective professional peer review.
>
> 4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal anti-trust law, unreasonably discourages physicians from participating in effective professional peer review.
>
> 5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. § 11101.

In response to these findings, Congress enacted the Health Care Quality Improvement Act. 42 U.S.C. 11101, et seq.

This legislation was enacted to encourage physicians to identify and discipline, through the peer review process, other physicians engaging in unprofessional behavior. As such, HCQIA was enacted to benefit professional medical review bodies and patients, not an aggrieved physician. Thus, it has been generally held that HCQIA does not provide an aggrieved physician with a private cause of action. Wayne v. Genesis Medical Center, 140 F.3d 1 145, 1148 (8th Cir. 1998); see also Hancock v. Blue Cross-Blue Shield of Kansas. Inc., 21 F 3(1 373 374-75 (10th Cir. 1994); Bok v. Mutual Assurance. Inc., 119 F.3d 927 928-29 (11* Cir. 1997), cert. denied, 523 U.S. 1 118, 118 S.Ct. 1796, 140 L.Ed.2d 937 (1998).

Here, the plaintiff is an aggrieved physician who was subjected to peer review at hospitals in Florida and Tennessee. He was not satisfied with the results of these peer reviews and is attempting to raise claims under HCQIA. However, this statute does not provide him

[5] The plaintiff attempts to justify his RICO claims by asserting that the defendants were
able to press forward their misrepresentations by means of mail fraud and abuse of process. The

with a private cause of action. Therefore, the plaintiff is unable to state a claim for relief under HCQIA.

C) Claims brought pursuant to 18 U.S.C. § 1961, et seq. (RICO)

The plaintiff describes his RICO claim by stating "the defendants were a group of corporations and persons associated together both formally and informally who were engaged in a common enterprise or course of conduct that involved conspiring to willfully, wantonly, fraudulently and/or negligently misrepresent facts surrounding the Plaintiff, and/or his clinical competence, and/or his application for or resignation of privileges, and/or his character as well as to effect [sic] breach of contract, abuse of process, to violate HCQIA and to publish stigmatizing statements." Docket Entry No. 64 at pgs. 17-18.

The Racketeer Influenced and Corrupt Organizations Act creates a civil cause of action for "any person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Generally speaking, §1962 makes it unlawful for anyone to profit "from a pattern of racketeering activity or through the collection of an unlawful debt". It must be noted, though, that an injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO is not sufficient to give rise to a cause of action under 18 U.S.C. j 1964(c). Beck v. Prupis, 529 U.S. 494, 120 S.Ct. 1608, 1616, 146 L.Ed.2d 561 (2000).

In this case, the overt actss complained of involve the alleged misrepresentation of facts relating to peer reviews of the plaintiffs competence as a physician, his application for or resignation of hospital privileges and "stigmatizing" statements made about him. None of these types of acts qualify as racketeering activity. See 18 U.S.C. § 1961(1). [5] Accordingly, the plaintiff has failed to state claims for relief under the RICO statutes.

D) Pendent State Law Claims

The plaintiff has also offered several state law claims for adjudication. These claims include fraudulent misrepresentation, breach of contract, negligence, suppression, wantonness, conspiracy and abuse of process. As discussed above, the plaintiff has failed to state an actionable claim implicating a federal question. A federal question was the basis for this Court's original jurisdiction over the case. When those claims giving the Court its original jurisdiction have been dismissed, the Court may decline to exercise supplemental jurisdiction over any pendent state law claims. 28 U.S.C. § 1367(c)(3); United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 1139-40, 16 L.Ed.2d 218 (1966). Finding no compelling reason for the Court to exercise supplemental jurisdiction in this case, the plaintiff s pendent state law claims should be dismissed without prejudice.

RECOMMENDATION

For the reasons discussed above, the undersigned respectfully RECOMMENDS that the defendants' Motions to Dismiss (Docket Entry Nos. 37, 45, 47, 49, 56 and 61) be GRANTED and that the plaintiffs federal claims should be DISMISSED with prejudice and his state law claims should be DISMISSED without prejudice. It is further RECOMMENDED that the defendants' Motion to Strike (Docket Entry No. 40) be DENIED as MOOT.

Any objections to this Report and Recommendation must be filed with the Clerk of Court

alleged mail fraud and abuse of process were mere by-products of the defendants misconduct. The underlying basis for plaintiff's RICO claims are the misrepresentations and

distortions of the facts as they have been offered by the defendants.
Page 9

within ten (10) days of receipt of this notice and must state with particularity the specific portions of the Report and Recommendation to which objection is made. Failure to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's Order regarding the Report and Recommendation. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); see also United States v. Walters, 638 F.2d 947 (6th cir. 1981).

Respectfully submitted,
s/ Joe Brown
Joe Brown
United States Magistrate Judge

Appendix 2

The opinion of the
United States District Court
Middle District of Tennessee
Nashville Division

3:05cv0006
Bradley S. Logan
P O Box 129
Goodlettsville, TN 37070

Case 3:05-cv-0006 Document 90-1 Filed 11/30/2005 Page 1 of 14

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRADLEY S. LOGAN, M.D.,
Plaintiff,
v.
HCA, INC., et al.,
Defendants.

Case No. 3:05-0006
Judge Echols

MEMORANDUM

Pending before the Court are the Report and Recommendation entered by the United States Magistrate Judge on May 23, 2005, (Docket Entry No. 85), and Plaintiff's Objections (Docket Entry No. 86.)

Defendants have filed Responses to the Objections by incorporating the arguments made in their Memoranda in Support of their Motions to Dismiss. (Docket Entry Nos. 87 & 88.) The Magistrate Judge recommends that this Court take the following actions: (1) grant the various Defendants' Motions to Dismiss (Docket Entry Nos. 37, 45, 47, 49, 56 and 61); (2) dismiss this action; and (3) deem Defendants' Motion to Strike (Docket Entry No. 55) moot.

I . STANDARD OF REVIEW

When a party makes timely objections to a Report and Recommendation, the Court "shall make a *de novo* determination of the matter and may conduct a new hearing, take additional evidence, recall witnesses, recommit the matter to the Magistrate Judge for further proceedings and consideration, conduct conferences with counsel for the affected parties, and receive additional arguments,

either oral or written, as the District Judge may desire." L.R.M.P. 9 (b) (3). See also, Fed.R.Civ.P. 72(a).

II. ANALYSIS

Plaintiff, a physician, was a member the medical staff at St. Petersburg General Hospital ("St. Petersburg") in St. Petersburg, Florida. After resigning that position, he moved to Lawrenceburg, Tennessee where he practiced at Crockett General Hospital ("Crockett"). Plaintiff then left that position, having already signed a Recruiting Agreement for clinical privileges at the Skyline Medical Center ("Skyline")

in Nashville. The Recruiting Agreement was ultimately rescinded and a second application withdrawn.

Because of the events which led to his resignations at St. Petersburg and Crockett, as well as the denial of privileges at Skyline, Plaintiff filed suit in this Court against dozens of individual and corporate defendants. The Complaint is long, spanning almost eighty pages. Such "length and breadth," Plaintiff explains, was necessary to "document almost ten years malfeasance by multiple entities and agents[.]" (Docket Entry No. 86 at 1.)

Plaintiff alleges he was harmed by assorted acts one of one or more of the Defendants relating to his employment at St. Petersburg and Crockett General Hospitals, and that misconduct on the part of some Defendants led to the denial of privileges at Skyline. A bevy of claims for relief are asserted, including fraudulent misrepresentation; "suppression" or misrepresentation by

Case 3:05-cv-00006 Document 90-1 Filed 11/30/2005 Page 3 of 14

concealment; conspiracy; negligence; "wantonness"; breach of contract; abuse of process; violations of the Racketeer Influenced Corrupt Organizations Act ("R.I.C.O."), 18 U.S.C. § 1961 et seq.; "stigmatizing statements" and failure to provide due process in violation of 42 U.S.C. § 1983; and violations of the Health Care Quality Improvement Act of 1986 ("HCQIA")

The Magistrate Judge concluded that Plaintiff's Complaint failed to state a claim upon which relief could be granted under 42 U.S.C. § 1983, the HCQIA, or R.I.C.O. That being so, there remained only state law claims. Since federal

question jurisdiction is the basis for this Court's original jurisdiction, the Magistrate Judge recommends that this Court decline to exercise supplemental jurisdiction over the state law claims and dismiss the entire action.

Plaintiff takes issue with respect to the Magistrate Judge's conclusion his Complaint fails to state a claim under any of the federal statutes cited. He also takes issue with factual statements contained in the Report and Recommendation.

A. Objections To Factual Statements

Plaintiff first asserts "[t]he Report contains an error in substance when states that Plaintiff, while residing Florida[,] resigned his position 'because of a dispute arising over his care certain patients.'" (Docket Entry No. 86 at 2 Instead, Plaintiff maintains a more accurate characterization is that he resigned "when became apparent that St. Petersburg General Hospital was acting in an aggressive and harassing matter

[sic] in reviewing patient charts not only of the Plaintiff but others; soon became evident that violations of HCQIA were occurring." (Id.)

Plaintiff's own characterization of this "fact" shows the Magistrate Judge did not improperly describe what happened. In Plaintiff's own words, patient charts were being reviewed by the hospital, suggesting that there was a dispute or question over patient care. Regardless, this "fact" is not relevant in ruling on the legal question of whether this Court has federal question jurisdiction.

Plaintiff next objects because while the Report and Recommendation states that an administrator of Petersburg notified the National Practitioner Data Base [Sic] ("NPDB") and the Florida Agency for Healthcare Administration ("AHCA") that Plaintiff had resigned while under investigation, the Report dismisses any act of mail or wire fraud. Obviously, this is not an Objection to the fact recounted, i.e. that the NPDB and AHCA were notified Plaintiff resigned while under investigation, but only an objection to whether that "fact" was properly taken into account in ruling on the Motions to Dismiss.

Plaintiff claims "[t]he Report also errs in asserting in the Background of the case when proffers as truth that the Recruiting Agreement with Skyline was rescinded 'because the plaintiff had failed to commence the full-time practice of medicine in the Skyline community on or before January 1, 2002.'/' (Id. At 2-3.) Although Plaintiff recognizes 'a letter certainly exists

Case 3:05-cv-00006 Document 90-1 Filed 11/30/2005 Page 5 of 14

representing that as the stated reason, "(id. at 3), the Report and Recommendation fails assert that another doctor with a "virtually identical Agreement" (id.) in similar circumstances did not have her agreement rescinded, nor does the Report and Recommendation indicate "that concurrent events such as falsification of meeting dates were being perpetrated." (Id.)

Tellingly, Plaintiff does not dispute that he did not in fact commence the full-time practice of medicine in the Skyline community by the set date. In this light, the "fact" identified by the Magistrate Judge cannot be viewed as erroneous-only

that other "facts" were not included. Given the length of Plaintiff's Complaint, it was necessary for the Magistrate Judge to pare down the facts and set forth only those which were relevant to determination of the legal issues at hand. Besides, even if another doctor in allegedly similar circumstances was treated differently, and even if dates of meetings were misstated (or in Plaintiff's words "falsified"), this would not change the Court's conclusion that Plaintiff does not have a federal claim so as to support this Court's jurisdiction.

Finally in regard to the facts, Plaintiff asserts that while the Magistrate Judge was correct setting forth a chronology of events which related to Plaintiff's failure to obtain privileges at Skyline, the Report and Recommendation failed include "key occurrences such as the Credentials Committee meeting in December, 2002 or the Hearing Committee in May, 2003." Id Again, given the abundance "facts" recited throughout the seventy-nine page

Case 3:05-cv-0006 Document 90-1 Filed 11/30/2005 Page 6 of 14

Complaint, would be virtually impossible for any decision to coherently contain all of the "facts." Moreover, inclusion of these "key occurrences" would not change the outcome-plaintiff has failed to state a federal claim upon which relief can be granted.

B. Objections to Legal Analysis

Plaintiff concedes this Court's jurisdiction to entertain his claims rests upon the viability of a cause of action under 42 U.S.C. § 1983, the HCQIA and/or R.I.C.O. (Docket Entry No. 86 at 3-4.) Accordingly, the Court will address Plaintiff's

Objections to the Magistrate's Recommendations regarding the same.

1. Claim Under 42 U.S.C. § 1983

In the Report and Recommendation, the Magistrate Judge noted that in order establish a claim under Section 1983, Plaintiff must show that Defendants, while acting under color of state law, deprived Plaintiff of some right or privilege guaranteed by the Constitution or laws of the United States. (Docket Entry No. 85 at 5.) The Magistrate Judge also noted the Defendants in this case were not individuals or entities with direct authority to act on behalf of the state and therefore, to be liable under Section 1983, it was necessary that their actions be fairly attributable to the state. Since Plaintiff failed to offer any "factual allegations that would seriously suggest that the defendants' actions are fairly attributable either Florida or Tennessee," (id.), Plaintiff failed to state a claim under § 42 U.S.C. 1983.

Plaintiff asserts "[the] Report errs stating: 'To state claim for relief under 42 1983, the plaintiff must plead and prove that the defendants, while acting.-'" (Docket Entry No. 86

Case 3:05-cv-0006 Document 90-1 Filed 11/30/2005 Page 7 of 14

at 5. It is more correct to say, Plaintiff contends, that "to succeed in proving a claim the defendant must first plead and then prove." Id. (emphasis in original).

Perhaps this is a scrivener's error on Plaintiff's part since Defendants need not prove anything with respect to Plaintiff's claims. Regardless, the Magistrate Judge did not err in writing in the conjunctive, even though proof follows

only if a claim is properly pled. In fact, in a recent case, the United States Court of Appeals for the Sixth Circuit, on appeal from the grant of a
motion to dismiss, wrote: "All § 1983 violations depend on the plaintiff's ability to plead and prove that a defendant: 1) acting under the color of state law 2) deprived a plaintiff of a right secured by the Constitution or law of the United States." Stanley v. City of Norton, 124 Fed.Appx. 305, 309, 2005 WL 65522 at *4 (6th Cir. Jan. 6, 2005) (emphasis added).

The linchpin of Plaintiff's objection to the Report and Recommendation about section 1983 liability is his belief that "the 'state law' in question here arises from the United States Congress." (Docket Entry No. 86 at 7.) In this vein, Plaintiff writes "[u]nder cloak of authority and qualified immunity granted by Congress in HCQIA, the Defendants performed their racketeering acts, which resulted in the placement stigmatizing statements into repository founded and overseen by the federal government, as well as loss of property memorialized by the Recruiting Agreement with Skyline." (Id. at 5.) Plaintiff then writes:

Case 3:05-cv-00006 Document 90-1 Filed 1 1/30/2005 Page 8 of 14

> Under HCQIA the government has, by reciprocity in authority and protection, entwined itself with hospitals
> for the responsibility of peer review activity, has set standards for its performance and reporting, has provided
> qualified immunity for its participants acting in their official capacities and when compliant with the HCQIA due

process requirements, and has imposed penalties on participants who fail to report their findings to NPDB.

Id. Plaintiff also states "[o]ne of the very reasons this claim was brought federal court is that the federal HCQIA is the law being perverted by hospitals and their peer review committees for unintended nefarious purposes." Id. At 10.

Insofar as Plaintiff is suggesting that HCQIA supplies the necessary "state action" for a Section 1983 claim, he is mistaken. As Plaintiff recognizes, the HCQIA is a federal statute. Where actions are taken under color of federal law, and not color of state law, no section 1983 action will lie. Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 978, 931 (6th Cir. 1987). See also, Sarin v. Samaritan Health Center, 813 F.2d 755, 759 (6Lh Cir. 1987) (in physician's claim relating to revocation of staff privileges, no state action was found to exist even though hospital was licensed by the state and received federal funds); Medical Society of New Jersey v. Mottola, 320 F.Supp.2d 254, 264 (D.N.J. 2004) (plain reading of statute indicates Congress did not intend HCQIA to allow private individuals to bring section 1983 action); Canady v. Providence Hospital, 903 F.supp. 125, 127 (D.D.C. 1995) ("A decision to restrict staff privileges does not constitute state action.").

Case 3:05-cv-00006 Document 90-1 Filed 11/30/2005 Page 9 of 14

Perhaps recognizing the difficulty with the assertion that the HCQIA could provide the requisite action "under color of state law" for purposes of section 1983 liability, Plaintiff notes that Tennessee and Florida peer review statutes "depend upon federal HCQIA" and that Tennessee's

provisions "reference[s] and combine[s] the federal law [.]" (Docket Entry 86 7.)

It is true that Tennessee Code Annotated § 63-6-219, which is the Tennessee Peer Review Law, begins by referencing the "applicable policies of the Health Care Quality Improvement Act of 1986." The statute then goes on to note it is "the stated policy of Tennessee to encourage committees made up of Tennessee's licensed physicians to candidly, conscientiously, and objectively evaluate and review their peers' professional conduct, competence, and ability to practice medicine." This grant of statutory authority for peer review, however, does not provide a basis for a claim under Section 1983.

In this regard, the decision in Freilich v. Board of Directors of Upper Chesapeake Health, Inc., 142 F.Supp.2d 679 (D.Md. 2001), affd, 313 F.3d 205 2002), is instructive. There, a physician filed a seventy-six page complaint against a hospital, assorted individuals, and the government, claiming the hospital and its board directors participated in "a predetermined and a deliberate scheme and systematic program designed to force her out of [the hospital] in violation [her] Constitutional Rights and in violation of Maryland's Health Code[.] Id. at 685.

Case 3:05-cv-00006 Document 90-1 Filed 11/302005 Page 10 of 14

In addressing the doctor's Section 1983 claim, the court in Freilich properly noted that to allege such claim it was necessary that there be not only action under state law but also that "the party charged with the deprivation must also be a person who may fairly be said to be a state actor." Id. (citing, American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 n.8, 119 S.Ct. 977 (1999)). While the Maryland

regulations required hospitals to "establish a formal reappointment process and to collect and review information," the regulations did not require hospitals to deny reappointment and the state played no role in the individual hospital's decision whether or not to reappoint particular physician. Id. at 686-87. Since the regulatory scheme left the decision to the judgment of the hospitals, "the actions of [the hospital] and the individual hospital defendants are not fairly attributable to the state." Id. at 686. See also Pinhas v. Summit Health Ltd., 894 F.2d 1024, 1033-34 (9th Cir. 1989) (there was no state action even though hospital's peer-review process was statutorily mandated since decision remove physician's staff privileges was made by private parties).

Likewise this case, the Tennessee statute cited by Plaintiff does transform the present Defendants into state actors. Instead, committees made up of licensed physicians are to review their peers' professional conduct. The Magistrate Judge did not err in concluding that Plaintiff's Complaint failed to state a claim under Section 1983 upon which relief could be granted. Accordingly, Plaintiff's

Case 3:05-cv-00006 Document 90-1 Filed 11/30/2005 Page 11 of 14

objections relating to his purported Section 1983 claim will be overruled.

2. The HCQIA Claim

The Report and Recommendation notes that courts have repeatedly held the HCQIA does not establish a private right of action and cites for that proposition Wayne v. Genesis Medical Center, 140 F.3d 1145, 1148 (8th Cir. 1998);

Hancock v. Blue Cross- Blue Shield of Kansas, Inc. 21 F.3d 373, 374-75 (10th Cir. 1994) and Bok v. Mutual Assurance, Inc., 119 F.3d 927, 928-29 (11th Cir. 1997). Recently, the United States Court of Appeals for the Eleventh Circuit added its view on the issue holding [t]here is no express private right of action under the HCQIA." Morris v. Emory Clinic Inc., 402 F.3d 1076, (11th Cir. 2005).

In his objections, Plaintiff claims he is not disputing the results of a peer review proceeding "but rather is claiming that his due process rights were denied during the peer review proceedingsl.l" (Docket Entry No. 86 at Plaintiff also claims that in enacting the HCQIA, "[t]he federal government had no intention of creating a private system that would deprive physicians of due process rights." (Id. at 11-12.)

While Plaintiff's suggestion may be facially correct, the purpose of the Act was not to protect physicians subjected to peer review. Quite the contrary, the "grant immunity review to review boards strongly suggests that the Act was not enacted to benefit the physician undergoing peer review." Wayne, 140 F.3d at 1148. In any event, the issue is whether the HCQIA provides for a private

cause of action. Those Circuits which have addressed the issue uniformly answer the question in the negative and Plaintiff has presented no reason why this Court should hold to the contrary. Thus, Plaintiff's objections which assert the Magistrate Judge erred in concluding there no private right of action under the HCQIA will be overruled.

3. The R.I.C.O. Claim

The Magistrate Judge recommends dismissal of the R.I.C.O. count because "the overt acts complained of involve the alleged misrepresentation of facts relating to peer reviews the plaintiff's competence as a physician, his application for or resignation of hospital privileges and 'stigmatizing' statements made about him," none of which acts qualify as racketeering activity." (Docket Entry No. 85 at 8. Plaintiff objects noting "[w]ire and mail fraud certainly qualify as acts of racketeering," (Docket Entry No. 86 at 15) and since he alleged the exchange of mail (particularly the sending of the reports to the NPDB and AHCA) and telephone calls, he stated a claim for relief under the civil R.I.C.O. statute.

Wire and mail fraud can be the predicate racketeering ants for purposes of R.I.C.O. However, merely mailing peer review committee results does not constitute mail fraud. Wasserman v. Maimonides Medical Center, 970 F.Supp. 183, 188 (E.D.N.Y. 1997). Moreover, with respect to the reports which were sent to NPDB and AHCA, Plaintiff has failed plead sufficient facts which would demonstrate that he relied on Defendants' alleged fraudulent

Case 3:05-cv-0006 Document 90-1 Filed 11/30/2005 Page 13 of 14

misrepresentation, something which is necessary to support R.I.C.O. claim. Central Distributors of Beer, Inc. v. Conn, 5 F.3d 181, 184 (6th Cir. 1993); Blount Financial Services, Inc. v. Heller, 819 F.2d 151, 152 (6th Cir. 1987).

The facts as pled by Plaintiff are general allegations of fraud with no specificity as to how the statements were false. This is insufficient because allegations of fraudulent predicate

acts are subject to the heightened pleading requirements of Rule 9(b)of the Federal Rules of Civil Procedure. "In addition to alleging the particular details of a fraud, 'the plaintiff[] must allege facts that give rise to a strong inference of fraudulent intent.'"First Capital Asset Management, Inc. v. Satinwood, Inc.,358 F.3d 159, 179 (2d Cir. 2004) (emphasis in original, citation omitted). Citing acts without showing they are indictable is insufficient to survive motion to dismiss. Howard v. America Online, 2O8 F.3d 741, 748 (9th Cir. 2000).

Here, Plaintiff has alleged no facts which would show the predicate acts are indictable or give rise to the strong inference of fraudulent intent on behalf of the Defendants. Accordingly, the Magistrate Judge was correct in ruling the Plaintiff's R.I.C.O claim failed to state a claim upon which relief could be granted and Plaintiff's objections to the contrary will be overruled.

III. CONCLUSION

On the basis of the foregoing, Plaintiff's Objections (Docket Entry No. 86) will be overruled and the Magistrate Judge's Report and Recommendation (Docket Entry No. 85) will be adopted.

Case 3:05-cv-00006 Document 90-1 Filed 11/30/2005 Page 14 of 14

Defendant's Motions to Dismiss (Docket Entry Nos. 37, 45, 47, 49, 56 and 61) will be granted. Defendants' Motion to Strike Portions of the Compliant (Docket Entry No. 40) will be deemed moot. This case will be dismissed with prejudice.

An appropriate order will be entered.

s/Robert Echols
Robert L. Echols
UNITED STATES DISTRICT COURT JUDGE

Case 3:05-cv-00006 Document 91-1 Filed 11/30/2005 Page 1 of 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRADLEY S. LOGAN, M.D.,
Plaintiff,
v.
HCA, INC., et al.
Defendants.

Case No. 3:05-0006
Judge Echols

ORDER

For reasons stated the Memorandum entered contemporaneously herewith, the Court rules as follows:

(1) Plaintiff's "Objections to the Report and Recommendation of Judge Joe B. Brown" (Docket Entry No. 86) are hereby OVERRULED;
(2) The Magistrate Judge's Report and Recommendation (Docket Entry No. 85) is hereby ADOPTED;

(3) Defendants' Motions to Dismiss (Docket Entry Nos. 37, 45, 49, 56 and 61) are hereby GRANTED;
(4) Defendants' Motion Strike Portions of the Complaint Docket Entry No. 40) is hereby deemed MOOT; and
(5) This case is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

Appendix 3
Opinion of the
Court of Appeals for the Sixth Circuit

Bradley S. Logan, M.D.
2202 N. West Shore Blvd.
Suite 200
Tampa, FL 33607

NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION
No. 06-5082

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED OCTOBER 5, 2006
LEONARD GREEN, Clerk

BRADLEY S. LOGAN, M.D.,
Plaintiff-Appellant,

HCA, INC.; ST. PETERSBURG GENERAL
HOSPITAL; CROCKETT HOSPITAL;
STEVEN B. RILEY; et al.,

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT 0F
TENNESSEE
Defendants-Appellees.

ORDER

Before: GUY, GILMAN, and ROGERS, Circuit Judges.

Bradley S. Logan, a pro se Florida resident, appeals a district court order dismissing his civil action filed pursuant to 18 U.S.C. j 1961 et seq., the Racketeering Influence Corrupt Organizations Act (RICO); 42 U.S.C. j 1983; 42 U.S.C. j 11101 et seq., the Healthcare Quality Improvement Act (HCQIA); and multiple state law claims. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Logan, who is a physician, sued more than fifty individuals, corporations, lawyers, law firms, doctors, and hospitals. In August of 1997, Logan was a member of the medical staff at the St. Petersburg General Hospital in St. Petersburg, Florida. Logan resigned his position at St. Petersburg General because of a dispute arising over his care of various patients. An administrator at the hospital notified the National Practitioner Data Bank (NPDB) and the Florida Agency of Healthcare Administration that Logan resigned while under investigation.

Following his resignation, Logan moved to Lawrenceburg, Tennessee, where he began a practice at Crockett General Hospital. Citing economic reasons, Logan left his practice at Crockett in January of 2002. Before leaving Crockett, Logan had applied for clinical privileges at Skyline Medical Center in Nashville, Tennessee.
In November of 2001, Logan signed recruiting agreement with Skyline. The agreement was rescinded because Logan had failed to start a full-time practice with

Skyline on or before January 1, 2002. On February 28, 2002, Logan met with the credentials committee at Skyline and learned that the committee would not recommend his application for privileges at the hospital. Shortly thereafter, Logan withdrew his application for privileges.

Later that year, Logan submitted a second application for privileges at Skyline. On July 7, 2003, the medical executive commit-tee at Skyline met and voted to deny Logan's second application for privileges at the hospital. Three days later, Logan sent a letter to Skyline withdrawing his application for privileges. An administrator at Skyline subsequently notified the NPDB that Logan's application or privileges had been denied rather than withdrawn.

The case was referred to a magistrate judge who recommended that Logan's federal claims be dismissed with prejudice. Regarding Logan's state law claims, the magistrate judge recommended that the court decline to exercise supplemental jurisdiction over the state claims and dismiss those claims without prejudice. Upon de novo review of the magistrate judge's report, the district court adopted the magistrate judge's recommendations and dismissed the case pursuant to Fed. R. Civ. P. 12(b)(6).

In his timely appeal, Logan argues that compliance with the HCQIA, which created the NPDB as a mechanism to track peer reviews mandated by state law, affects a physician's property rights, thus invoking a cognizable claim under 42 U.S.C. j 1983. Logan's second argument is that the HCQIA was enacted for the benefit of patients, and not physicians. As the statute advances the rights of one group (patients) at the expense and detriment of another (physicians), a violation of fundamental fairness has occurred. Finally,

Logan asserts that the district court erroneously interpreted RICO.

The district court's decision to dismiss the complaint under Rule 12(b)(6) is reviewed de novo. See Amini v. Oberlin Coll., 259 F.3d 493, 497 (6th Cir. 2001). We may affirm on any ground supported by the record. See City of Monroe Employees Ret. Sys v. Bridgestone Corp., 399 F.3d 651, 665 (6th Cir.), cert. denied, 126 S. Ct. 423 (2005).

When determining whether a complaint fails to state a claim, the court must construe the complaint in the light most favorable to the plaintiff, accept allthe allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts that would entitle him to relief. Wright v. MetroHealth Med Ctr, 58 F.3d 1130, 1138 (6th Cir. 1995). A complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). The court is not required to accept nonspecific factual allegations and inferences of unwarranted legal conclusions. Morgan v. Church 's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987).

To state a 1983 claim, a plaintiff must allege that a person acting under color of state law deprived the plaintiff of a right secured by the Constitution or federal laws. Flagg Bros. v. Brooks, 436 U.S. 149, 155-57 (1978). Logan's 1983 action is based on the premise that the state's peer review law, which is a result of HCQIA, cloaks the defendants' alleged actions with the color of state law. The question for purposes of 1983

is whether the conduct of these private individuals can be fairly attributable to the state. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). Such actions must have been "traditionally the exclusive prerogative" of the state. 1d. However, the fact that a person or entity performs a function that is subject to state regulation does not convert the action to that of the state. Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974). The defendants' alleged actions were pursuant to federal and state regulations. The actions are in no way affiliated with the state so as to subject the defendants to j 1983 liability. See id. at 351. The argument is without merit.

As for Logan's argument regarding HCQIA, the HCQIA does not create a private right of action. Wayne v. Genesis Med Ctr., 140 F.3d 1 145, 1 148 (8th Cir. 1 998); Bok v. Mutual Assurance, Inc., 119 F.3d 927, 928-29 (1 1th Cir. 1997); Hancock v. Blue Cross-Blue Shield of Kan., Inc., 21 F.3d 373, 374-75 (10th Cir. 1994).

Logan failed to establish a RICO claim. A RICO claim requires proof of two or more predicate offenses that formed a pattern of racketeering activity that involved an enterprise that was connected to the racketeering activity, which injured a plaintiffs business or property. 18 U.S.C. 1961-64; VanDenBroeck v. Commonpoint Mortgage. Co., 210 F.3d 696, 699 (6th Cir. 2000). RICO defines an enterprise as "includ(ing) any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The existence of an enterprise is shown "by evidence of an ongoing organization, formal or informal,

and by evidence that the various associates function as a continuing
unit." United States v. Turkette, 452 U.S. 576, 583 (198 1). Continuity of structure exists where there is an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuing, rather than ad hoc, basis." United States v. Kragness, 830 F.2d 842, 856 (8th Cir. 1987). The overt acts complained about by Logan concern alleged misrepresentations of facts relating to peer reviews of Logan's competence as a physician, his application for resignation of hospital privileges, and the "stigmatizing" statements made about Logan. Logan's allegations do not establish that the defendants formed an enterprise as defined by RICO. Accordingly, Logan did not state a RICO violation against the defendants.

Finally, as for Logan's state-law claims, since Logan did not state a federal claim, the district court did not err in refusing to exercise supplemental jurisdiction over his state-law claims. See Saglioccolo v. Eagle Ins. Co., 1 12 F.3d 226, 233 (6th Cir. 1997).

Accordingly, we affirm the district court's order. Rule 34U)(2)(C), Rules of the Sixth
Circuit.

ENTERED BY ORDER OF THE COURT
Clerk

Appendix 4

42 USC CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

Sec. 11101. Findings.

SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES
11111. Professional review.
(a) In general.
(b) Exception.
(c) Treatment under State laws.
11112. Standards for professional review actions.
(a) In general.
(b) Adequate notice and hearing.
(c) Adequate procedures in investigations or health emergencies.
11113. Payment of reasonable attorneys' fees and costs in defense of suit.
11114. Guidelines of Secretary.
11115. Construction.
(a) In general.
(b) Scope of clinical privileges.
(c) Treatment of nurses and other practitioners.

(d) Treatment of patient malpractice claims.

SUBCHAPTER II - REPORTING OF INFORMATION

11131. Requiring reports on medical malpractice payments.

(a) In general.
(b) Information to be reported.
(c) Sanctions for failure to report.
(d) Report on treatment of small payments.

11132. Reporting of sanctions taken by Boards of Medical Examiners.

(a) In general.
(b) Failure to report.

11133. Reporting of certain professional review actions taken by health care entities.

(a) Reporting by health care entities.
(b) Reporting by Board of Medical Examiners.
(c) Sanctions.
(d) References to Board of Medical Examiners.

11134. Form of reporting.

(a) Timing and form.
(b) To whom reported.
(c) Reporting to State licensing boards.

11135. Duty of hospitals to obtain information.

(a) In general.
(b) Failure to obtain information.
(c) Reliance on information provided.

11136. Disclosure and correction of information.

11137. Miscellaneous provisions.

(a) Providing licensing boards and other health care entities with access to information.
(b) Confidentiality of information.
(c) Relief from liability for reporting.
(d) Interpretation of information.

SUBCHAPTER III - DEFINITIONS AND REPORTS

11151. Definitions.
11152. Reports and memoranda of understanding.
(a) Annual reports to Congress.
(b) Memoranda of understanding.
(c) Memorandum of understanding with Drug Enforcement Administration.

42 USC Sec. 11101 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

Sec. 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

(Pub. L. 99-660, title IV, Sec. 402, Nov. 14, 1986, 100 Stat. 3784.)

SHORT TITLE

Section 401 of title IV of Pub. L. 99-660 provided that: "This title [enacting this chapter and provisions set out as a note under section 11111 of this title] may be cited as the 'Health Care Quality Improvement Act of 1986'."

42 USC SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

42 USC Sec. 11111 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

Sec. 11111. Professional review

(a) In general

(1) Limitation on damages for professional review actions. If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section -

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action, shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 15c of title 15, where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies. Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception

If the Secretary has reason to believe that a health care entity has failed to report information in accordance with

section 11133(a) of this title, the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the
name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

(c) Treatment under State laws

(1) Professional review actions taken on or after October 14, 1989. Except as provided in paragraph (2), subsection (a) of this section shall apply to State laws in a State only for professional review actions commenced on or after October 14, 1989.

(2) Exceptions

(A) State early opt-in

Subsection (a) of this section shall apply to State laws in a State for actions commenced before October 14, 1989, if the State by legislation elects such treatment.

(B) Effective date of election

An election under State law is not effective, for purposes of (1) for actions commenced before the effective date of the State law, which may not be earlier than the date of the enactment of that law.

(Pub. L. 99-660, title IV, Sec. 411, Nov. 14, 1986, 100 Stat. 3784;

Pub. L. 100-177, title IV, Sec. 402(c), as added Pub. L. 101-239, title VI, Sec. 6103(e)(6)(A), Dec. 19, 1989, 103 Stat. 2208.)

REFERENCES IN TEXT

The Civil Rights Act of 1964, referred to in subsec. (a)(1), is Pub. L. 88-352, July 2, 1964, 78 Stat. 241, as amended, which is classified principally to subchapters II to IX (Sec. 2000a et seq.) of chapter 21 of this title. Title VII of this Act relates to equal employment opportunities, and is classified generally to subchapter VI (Sec. 2000e et seq.) of chapter 21 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

The Civil Rights Acts, referred to in subsec. (a)(1), are classified generally to chapter 21 (Sec. 1981 et seq.) of this title.

AMENDMENTS

1989 - Subsec. (c)(2)(B), (C). Pub. L. 101-239 added Pub. L. 100-177, Sec. 402(c), see 1987 Amendment note below.

1987 - Subsec. (c)(2)(B), (C). Pub. L. 100-177, Sec. 402(c), as added by Pub. L. 101-239, redesignated subpar. (C) as (B), struck out "subparagraphs (A) and (B)" after "for purposes of", and struck out former subpar. (B) which read as follows: "Subsection (a) of this section shall not apply to State laws in a State for actions commenced on or after October 14, 1989, if the State by legislation elects such treatment."

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100-177 effective Nov. 14, 1986, see section 402(d) of Pub. L. 100-177, as renumbered and amended, set out as a note under section 11137 of this title.

EFFECTIVE DATE

Section 416 of Pub. L. 99-660 provided that: "This part [part A (Secs. 411-416) of title IV of Pub. L. 99-660, enacting this subchapter] shall apply to professional review actions commenced on or after the date of the enactment of this Act [Nov. 14, 1986]."

-FOOTNOTE-

(!1) So in original. Probably should be "for purposes of subparagraph (A),".

42 USC Sec. 11112 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

Sec. 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken -

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating -

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating -

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B) -

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity) -

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right -

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right -

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as -

(1) requiring the procedures referred to in subsection (a)(3) of this section -

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

(Pub. L. 99-660, title IV, Sec. 412, Nov. 14, 1986, 100 Stat. 3785.)

42 USC Sec. 11113 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

Sec. 11113. Payment of reasonable attorneys' fees and costs in defense of suit

In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney' fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

(Pub. L. 99-660, title IV, Sec. 413, Nov. 14, 1986, 100 Stat.
3787.)

42 USC Sec. 11114 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

Sec. 11114. Guidelines of Secretary

The Secretary may establish, after notice and opportunity for comment, such voluntary guidelines as may assist the professional review bodies in meeting the standards described in section 11112(a) of this title.
(Pub. L. 99-660, title IV, Sec. 414, Nov. 14, 1986, 100 Stat. 3787.)

42 USC Sec. 11115 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

Sec. 11115. Construction
(a) In general
Except as specifically provided in this subchapter, nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this subchapter.
(b) Scope of clinical privileges
Nothing in this subchapter shall be construed as requiring healt care entities to provide clinical privileges to any or all

classes or types of physicians or other licensed health care practitioners.

(c) Treatment of nurses and other practitioners

Nothing in this subchapter shall be construed as affecting, or modifying any provision of Federal or State law, with respect to activities of professional review bodies regarding nurses, other licensed health care practitioners, or other health professionals who are not physicians.

(d) Treatment of patient malpractice claims

Nothing in this chapter shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician, health care practitioner, or health care entity, or as limiting any defenses or immunities available to any physician, health care practitioner, or health care entity.

(Pub. L. 99-660, title IV, Sec. 415, Nov. 14, 1986, 100 Stat. 3787;

Pub. L. 100-177, title IV, Sec. 402(c), as added Pub. L. 101-239,

title VI, Sec. 6103(e)(6)(A), Dec. 19, 1989, 103 Stat. 2208.)

AMENDMENTS

1989 - Subsec. (a). Pub. L. 101-239 added Pub. L. 100-177, Sec.

402(c), see 1987 Amendment note below.

1987 - Subsec. (a). Pub. L. 100-177, Sec. 402(c), as added by

Pub. L. 101-239, inserted before period at end "or as preempting or

overriding any State law which provides incentives, immunities, or
protection for those engaged in a professional review action that
is in addition to or greater than that provided by this subchapter".

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100-177 effective Nov. 14, 1986, see section
402(d) of Pub. L. 100-177, as renumbered and amended, set out as a
note under section 11137 of this title.

42 USC SUBCHAPTER II - REPORTING OF INFORMATION 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

SUBCHAPTER II - REPORTING OF INFORMATION

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 11152 of this title.

42 USC Sec. 11131 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER II - REPORTING OF INFORMATION

Sec. 11131. Requiring reports on medical malpractice payments

(a) In general

Each entity (including an insurance company) which makes payment under a policy of insurance, self-insurance, or otherwise in settlement (or partial settlement) of, or in satisfaction of a judgment in, a medical malpractice action or claim shall report, in accordance with section 11134 of this title, information respecting the payment and circumstances thereof.

(b) Information to be reported

The information to be reported under subsection (a) of this section includes -

(1) the name of any physician or licensed health care practitioner for whose benefit the payment is made,

(2) the amount of the payment,

(3) the name (if known) of any hospital with which the physician or practitioner is affiliated or associated,

(4) a description of the acts or omissions and injuries or illnesses upon which the action or claim was based, and

(5) such other information as the Secretary determines is required for appropriate interpretation of information reported under this section.

(c) Sanctions for failure to report

Any entity that fails to report information on a payment required to be reported under this section shall be subject to a civil money penalty of not more than $10,000 for each such payment involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under

subsection (a) of section 1320a-7a of this title are imposed and collected under that section.

(d) Report on treatment of small payments

The Secretary shall study and report to Congress, not later than two years after November 14, 1986, on whether information respecting small payments should continue to be required to be reported under subsection (a) of this section and whether information respecting all claims made concerning a medical malpractice action should be required to be reported under such subsection.

(Pub. L. 99-660, title IV, Sec. 421, Nov. 14, 1986, 100 Stat.
3788.)

42 USC Sec. 11132 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

Sec. 11132. Reporting of sanctions taken by Boards of Medical Examiners

(a) In general

(1) Actions subject to reporting

Each Board of Medical Examiners -

(A) which revokes or suspends (or otherwise restricts) a physician's license or censures, reprimands, or places on probation a physician, for reasons relating to the physician's professional competence or professional conduct, or

(B) to which a physician's license is surrendered,

shall report, in accordance with section 11134 of this title, the information described in paragraph (2).

(2) Information to be reported

The information to be reported under paragraph (1) is -

(A) the name of the physician involved,

(B) a description of the acts or omissions or other reasons (if known) for the revocation, suspension, or surrender of license, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Failure to report

If, after notice of noncompliance and providing opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (a) of this section, the Secretary shall designate another qualified entity for the reporting of information under section 11133 of this title.

(Pub. L. 99-660, title IV, Sec. 422, Nov. 14, 1986, 100 Stat. 3789.)

42 USC Sec. 11133 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER II - REPORTING OF INFORMATION

Sec. 11133. Reporting of certain professional review actions taken by health care entities

(a) Reporting by health care entities

(1) On physicians

Each health care entity which -

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician -

(i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding; or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society, shall report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3).

(2) Permissive reporting on other licensed health care practitioners

A health care entity may report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3) in the case of a licensed health care practitioner who is not a physician, if the entity would be required to report such information under paragraph (1) with respect to the practitioner if the practitioner were a physician.

(3) Information to be reported

The information to be reported under this subsection is -

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Reporting by Board of Medical Examiners

Each Board of Medical Examiners shall report, in accordance with section 11134 of this title, the information reported to it under subsection (a) of this section and known instances of a health care entity's failure to report information under subsection (a)(1) of this section.

(c) Sanctions

(1) Health care entities

A health care entity that fails substantially to meet the requirement of subsection (a)(1) of this section shall lose the protections of section 11111(a)(1) of this title if the Secretary publishes the name of the entity under section 11111(b) of this title.

(2) Board of Medical Examiners

If, after notice of noncompliance and providing an opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (b) of this section, the Secretaryshall designate another qualified entity for the reporting of information under subsection (b) of this section.

(d) References to Board of Medical Examiners

Any reference in this subchapter to a Board of Medical Examiners includes, in the case of a Board in a State that fails to meet the reporting requirements of section 11132(a) of this title or subsection (b) of this section, a reference to such other qualified entity as the Secretary designates.

(Pub. L. 99-660, title IV, Sec. 423, Nov. 14, 1986, 100 Stat. 3789.)

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER II - REPORTING OF INFORMATION

Sec. 11134. Form of reporting

(a) Timing and form

The information required to be reported under sections 11131, 11132(a), and 11133 of this title shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. Such information shall first be required to be reported on a date (not later than one year after November 14, 1986) specified by the Secretary.

(b) To whom reported

The information required to be reported under sections 11131, 11132(a), and 11133(b) of this title shall be reported to the Secretary, or, in the Secretary's discretion, to an appropriate private or public agency which has made suitable arrangements with the Secretary with respect to receipt, storage, protection of confidentiality, and dissemination of the information under this subchapter.

(c) Reporting to State licensing boards

(1) Malpractice payments

Information required to be reported under section 11131 of this title shall also be reported to the appropriate State licensing board (or boards) in the State in which the medical malpractice claim arose.

(2) Reporting to other licensing boards

Information required to be reported under section 11133(b) of this title shall also be reported to the appropriate State licensing board in the State in which the health care entity is located if it is not otherwise reported to such board under subsection (b) of this section.

(Pub. L. 99-660, title IV, Sec. 424, Nov. 14, 1986, 100 Stat. 3790.)

42 USC Sec. 11135 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

Sec. 11135. Duty of hospitals to obtain information

(a) In general

It is the duty of each hospital to request from the Secretary (or the agency designated under section 11134(b) of this title), on and after the date information is first required to be reported under section 11134(a) of this title) -

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical privileges at, the hospital, information reported under this subchapter concerning the physician or practitioner, and

(2) once every 2 years information reported under this subchapter concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital. A hospital may request such information at other times.

(b) Failure to obtain information

With respect to a medical malpractice action, a hospital which does not request information respecting a physician or practitioner as required under subsection (a) of this section is presumed to have knowledge of any information reported under this subchapter to the Secretary with respect to the physician or practitioner.

(c) Reliance on information provided

Each hospital may rely upon information provided to the hospital under this chapter and shall not be held liable for such reliance in the absence of the hospital's knowledge that the information provided was false.

(Pub. L. 99-660, title IV, Sec. 425, Nov. 14, 1986, 100 Stat.
3790.)

-FOOTNOTE-

(1) So in original. The closing parenthesis probably should not appear.

42 USC Sec. 11136 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

Sec. 11136. Disclosure and correction of information

With respect to the information reported to the Secretary (or the agency designated under section 11134(b) of this title) under this subchapter respecting a physician or other licensed health care practitioner, the Secretary shall, by regulation, provide for -

(1) disclosure of the information, upon request, to the physician or practitioner, and

(2) procedures in the case of disputed accuracy of the information.

(Pub. L. 99-660, title IV, Sec. 426, Nov. 14, 1986, 100 Stat. 3791.)

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

Sec. 11137. Miscellaneous provisions

(a) Providing licensing boards and other health care entities with access to information

The Secretary (or the agency designated under section 11134(b) of this title) shall, upon request, provide information reported under this subchapter with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner or to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

(b) Confidentiality of information

(1) In general

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make

such disclosure. Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 11134(b) of this title), on application by any person, shall prepare such information in such form and shall disclose such information in such form.

(2) Penalty for violations

Any person who violates paragraph (1) shall be subject to a civil money penalty of not more than $10,000 for each such violation involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1320a-7a of this title are imposed and collected under that section.

(3) Use of information

Subject to paragraph (1), information provided under section 11135 of this title and subsection (a) of this section is intended to be used solely with respect to activities in the furtherance of the quality of health care.

(4) Fees

The Secretary may establish or approve reasonable fees for the disclosure of information under this section or section 11136 of this title. The amount of such a fee may not exceed the costs of processing the requests for disclosure and of providing such information. Such fees shall be available to the Secretary (or, in the Secretary's discretion, to the agency designated under section 11134(b) of this title) to cover such costs.

(c) Relief from liability for reporting

No person or entity (including the agency designated under section 11134(b) of this title) shall be held liable in any civil action with respect to any report made under this subchapter (including information provided under subsection

(a) of this section (!1) without knowledge of the falsity of the information contained in the report.

(d) Interpretation of information

In interpreting information reported under this subchapter, a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred.

(Pub. L. 99-660, title IV, Sec. 427, Nov. 14, 1986, 100 Stat. 3791;

Pub. L. 100-177, title IV, Sec. 402(a), (b), Dec. 1, 1987, 101

Stat. 1007.)

AMENDMENTS

1987 - Subsec. (b)(1). Pub. L. 100-177, Sec. 402(a)(1), substituted "as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary)" for "with respect to medical malpractice actions" and inserted at end "Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 11134(b) of this title), on application by any person, shall prepare such information in such form and shall disclose such information in such form."

Subsec. (b)(4). Pub. L. 100-177, Sec. 402(b), added par. (4).

Subsec. (c). Pub. L. 100-177, Sec. 402(a)(2), inserted "(including the agency designated under section 11134(b) of this title)" after "entity" and "(including information provided under subsection (a) of this section" after "subchapter".

EFFECTIVE DATE OF 1987 AMENDMENT

Section 402(d), formerly section 402(c), of Pub. L. 100-177, as renumbered and amended by Pub. L. 101-239, title VI, Sec. 6103(e)(6), Dec. 19, 1989, 103 Stat. 2208, provided that:

"(1) In general. - The amendments made by subsections (a) and (c) [amending this section and sections 1111 and 1115 of this title] shall become effective on November 14, 1986.

"(2) Fees. - The amendment made by subsection (b) [amending this section] shall become effective on the date of enactment of this Act [Dec. 1, 1987]."

-FOOTNOTE-

(!1) So in original. Probably should be followed by a closing parenthesis.

42 USC SUBCHAPTER III - DEFINITIONS AND REPORTS 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER III - DEFINITIONS AND REPORTS

SUBCHAPTER III - DEFINITIONS AND REPORTS

42 USC Sec. 11151 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER III - DEFINITIONS AND REPORTS

Sec. 11151. Definitions

In this chapter:

(1) The term "adversely affecting" includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.

(2) The term "Board of Medical Examiners" includes a body comparable to such a Board (as determined by the State) with responsibility for the licensing of physicians and also includes a subdivision of such a Board or body.

(3) The term "clinical privileges" includes privileges, membership on the medical staff, and the other circumstances pertaining to the furnishing of medical care under which a physician or other licensed health care practitioner is permitted to furnish such care by a health care entity.

(4)(A) The term "health care entity" means -

(i) a hospital that is licensed to provide health care services by the State in which it is located,

(ii) an entity (including a health maintenance organization or group medical practice) that provides health care services and that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary), and

(iii) subject to subparagraph (B), a professional society (or committee thereof) of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary).

(B) The term "health care entity" does not include a professional society (or committee thereof) if, within the previous 5 years, the society has been found by the Federal

Trade Commission or any court to have engaged in any anti-competitive practice which had the effect of restricting the practice of licensed health care practitioners.

(5) The term "hospital" means an entity described in paragraphs (1) and (7) of section 1395x(e) of this title.

(6) The terms "licensed health care practitioner" and "practitioner" mean, with respect to a State, an individual (other than a physician) who is licensed or otherwise authorized by the State to provide health care services.

(7) The term "medical malpractice action or claim" means a written claim or demand for payment based on a health care provider's furnishing (or failure to furnish) health care services, and includes the filing of a cause of action, based on the law of tort, brought in any court of any State or the United States seeking monetary damages.

(8) The term "physician" means a doctor of medicine or osteopathy or a doctor of dental surgery or medical dentistry legally authorized to practice medicine and surgery or dentistry by a State (or any individual who, without authority holds himself or herself out to be so authorized).

(9) The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on -

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

(10) The term "professional review activity" means an activity of a health care entity with respect to an individual physician -

(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,

(B) to determine the scope or conditions of such privileges or membership, or

(C) to change or modify such privileges or membership.

(11) The term "professional review body" means a health careentity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

(12) The term "Secretary" means the Secretary of Health and Human Services.

(13) The term "State" means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

(14) The term "State licensing board" means, with respect to a physician or health care provider in a State, the agency of the State which is primarily responsible for the licensing of the physician or provider to furnish health care services.

(Pub. L. 99-660, title IV, Sec. 431, Nov. 14, 1986, 100 Stat. 3792.)

42 USC Sec. 11152 01/06/03

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER III - DEFINITIONS AND REPORTS

Sec. 11152. Reports and memoranda of understanding

(a) Annual reports to Congress

The Secretary shall report to Congress, annually during the three years after November 14, 1986, on the implementation of this chapter.

(b) Memoranda of understanding

The Secretary of Health and Human Services shall seek to enter into memoranda of understanding with the Secretary of Defense and the Administrator of Veterans' Affairs to apply the provisions of subchapter II of this chapter to hospitals and other facilities and health care providers under the jurisdiction of the Secretary or Administrator, respectively. The Secretary shall report to Congress, not later than two years after November 14, 1986, on any such

memoranda and on the cooperation among such officials in establishing such memoranda.

(c) Memorandum of understanding with Drug Enforcement Administration

The Secretary of Health and Human Services shall seek to enter into a memorandum of understanding with the Administrator of Drug Enforcement relating to providing for the reporting by the Administrator to the Secretary of information respecting physicians and other practitioners whose registration to dispense controlled substances has been suspended or revoked under section 824 of title

21. The Secretary shall report to Congress, not later than two years after November 14, 1986, on any such memorandum and on the cooperation between the Secretary and the Administrator in establishing such a memorandum.

(Pub. L. 99-660, title IV, Sec. 432, Nov. 14, 1986, 100 Stat. 3794.)

CHANGE OF NAME

Reference to Administrator of Veterans' Affairs deemed to refer

to Secretary of Veterans Affairs pursuant to section 10 of Pub. L. 100-527, set out as a Department of Veterans Affairs Act note under section 301 of Title 38, Veterans' Benefits.

-End-

Appendix 5
Racketeer Influenced and Corrupt Organizations Act

Sec. 1961. Definitions

As used in this chapter -

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1081 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section

1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes),

sections 2421-2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain.

(2) "State" means any State of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United

States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Sec. 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketerring activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or

more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of any unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Sec. 1963 . Criminal penalties.

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law -

any interest the person has acquired or maintained in violation of section 1962;

any -
(A) interest in;
(B) security of;

(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
(E) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962. The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes -

real property, including things growing on, affixed to, and found in land; and tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (1) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonable without cause to believe

that the property was subject to forfeiture under this section.

(d) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section –

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed form the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered: Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order. □

The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary

expenses to the enterprise which are required by law, or which are necessary to protect the interest of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision of the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasure any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to -

grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this

chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provision of this chapter;

compromise claims arising under this section;

award compensation to persons providing information resulting in a forfeiture under this section;

direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to -

making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

granting petitions for remission or mitigation of forfeiture;

the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

the disposition by the United States of forfeited property by public sale or other commercially feasible means;

the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

the compromise of claims arising under this chapter. Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (1), no party claiming an interest in property subject to forfeiture under this section may -

intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the

United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

The hearing on the petition shall, to the extent practicable and consistent with the interest of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that -
(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) if any of the property described n subsection (a), as a result of any act or omission of the defendant –

cannot be located upon the exercise of due diligence;

has been transferred or sold to, or deposited with, a third party;

has been placed beyond the jurisdiction of the court;

has been substantially diminished in value; or

has been commingled with other property which cannot be divided without difficulty, the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Sec. 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue

therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Sec. 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by

the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issue for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Sec. 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. a copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

Sec. 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

Sec. 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall -

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced there under with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall -

(1) contain any requirement which would be held to be

unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by -

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized

representatives of such person.

Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

Upon the completion of -
(i) the racketeering investigation for which any documentary material was produced under this chapter, and
(ii) any case or proceeding arising from such investigation,
the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising there from has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material

other than copies thereof made pursuant to this subsection so produced by such person.

In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly -
(i) designate another racketeering investigator to serve as custodian thereof, and
(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be

agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

Appendix 6
Tennessee Peer Review Law (TPRL) TCA 63-6-219

Tenn.Code Ann. 63-6-219

Legislative policy declaration – Medical review committees – Immunity of members – Confidentiality of records – Short Title

(a) this section shall be known and may be cited as the "Tennessee Peer Review Law of 1967."

(b) (1) In conjunction with the applicable policies of the Health Care Quality Improvement Act of 1986 (42 U.S.C. §§ 11101-11152), it is the stated policy of Tennessee to encourage committees made up of Tennessee's licensed physicians to candidly, conscientiously, and objectively evaluate and review their peer's professional conduct, competence, and ability to practice medicine.

Tennessee further recognizes that confidentiality is essential both to effective functioning of these peer review committees and to continued improvement in the care and treatment of patients.

(2) As incentive for the medical profession to undertake professional review, including the review of health care costs, peer review committees must be protected from liability for their good-faith efforts.

To this end, peer review committees should be granted certain immunities relating to their actions undertaken as part of their responsibility to review, discipline, and educate the profession.

In instances of peer review committees examining the appropriateness of physician's fees, this immunity must also extend to restraint of trade claims under title 47, chapter 25.

(c) As used in this section, "medical review committee" or "peer review committee" means any committee of a state or local professional association or society, including impaired physician review committees, programs, malpractice support groups and their staff personnel, or a committee of any licensed health care institution, or the medical staff thereof, or any committee of a medical care foundation or health maintenance organization, preferred provider organization, individual practice association or similar entity, the function of which, or one (1) of the functions of which, is to evaluate and improve the quality of health care rendered by providers of health care service to provide intervention, support, or rehabilitative referrals or services, or to determine that health care services rendered were professionally indicated, or were performed in compliance with the applicable standard of care, or that the cost of health care rendered was considered reasonable by the providers of professional health care services in the area and includes a committee functioning as a utilization review committee under the provisions of Public Law 89-97 (42

U.S.C. xx 1395-1395pp) (Medicare Law), or as a utilization and quality control peer review organization under the provisions of the Peer Review Improvement Act of 1982, Public Law 97-248, xx 141 – 150, or a similar committee or a committee of similar purpose, to evaluate or review the diagnosis or treatment or the performance or rendition of medical or hospital services which are performed under public medical programs of either state or federal design.

(d) (1) All state and local professional associations and societies and other organizations, institutions, foundations, entities and associated committees as identified in subsection (c), physicians, surgeons, registered nurses, hospital administrators and employees, members of boards of directors or trustees of any publicly supported or privately supported hospital or other such provider of health care, any person acting as a staff member of a medical review committee, any person under a contract or other formal agreement with a medical review committee, any person who participates with or assists a medical review committee with respect to its functions, or any other individual appointed to any committee, as such term is described in subsection (c), is immune from liability to any patient, individual or organization for furnishing information, data, reports or records to any such committee or for damages resulting from any decision, opinions, actions and proceedings rendered, entered or acted upon by such committees undertaken or performed within the scope or function of the

duties of such committees, if made or taken in good faith and without malice and on the basis of facts reasonably known or reasonably believed to exist.

Such immunity also shall extend to any such entity, committee or individual listed in this subsection when that entity, committee, or individual provides, or attempts to provide, assistance directly related to and including alcohol or drug counseling and intervention through an impaired professional program, or if none, through a requesting professional society, to any title 63 licensee, or applicant for license.

Physicians health programs and physicians health peer review committees shall be immune from liability for providing intervention, referral, and other support services to the minor children or spouse or both of physicians.

(2) Notwithstanding the provisions of subdivision (d)(1), any person providing information, whether as a witness or otherwise, to a medical review committee regarding the competence or professional conduct of a physicians is immune from liability to any person, unless such information is false and the person providing it had actual knowledge of such falsity.

(3) A member of a medical review committee, or person reporting information to a medical review committee, is presumed to have acted in good faith and without malice. Any person alleging lack of good faith has the burden of proving bad faith and malice.

(e) All information, interviews, incident or other reports, statements, memoranda or other data furnished to any committee as defined in this section, and any findings, conclusions or recommendations resulting from the proceedings of such committee are declared to be privileged. All such information, in any form whatsoever, so furnished to, or generated by, a medical peer review committee, shall be privileged. The records and proceedings of any such committees are confidential and shall be used by such committee, and the members thereof only in the exercise of the proper functions of the committee, and shall not be public records nor be available for court subpoena or for discovery proceedings.

One (1) proper function of such committees shall include advocacy for physicians before other medical peer review committees, peer review organizations, health care entities, private and governmental insurance carriers, national or local accreditation bodies, and the state board of medical examiners of this or any other state. The disclosure of confidential, privileged peer review committee information to such entities during advocacy, or as a report to the board of medical examiners under x 63-6-214(d), or to the affected physician under review, does not constitute either a waiver of confidentiality or privilege. Nothing contained herein applies to records made in the regular course of business by a hospital or other provider of health care and information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil proceedings merely because they

were presented during proceedings of such committee.

(f) If any provision of this section, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to that end the provisions of this section are declared to be severable.

Appendix 7

Title XXIX, Chapter 395
PUBLIC HEALTH

HOSPITAL LICENSING AND REGULATION

395.0193 Licensed facilities; peer review; disciplinary powers; agency or partnership with physicians.--

(1) It is the intent of the Legislature that good faith participants in the process of investigating and disciplining physicians pursuant to the state-mandated peer review process shall, in addition to receiving immunity from retaliatory tort suits pursuant to s. 456.073(12), be protected from federal antitrust suits filed under the Sherman Anti-Trust Act, 15 U.S.C.A. ss. 1 et seq. Such intent is within the public policy of the state to secure the provision of quality medical services to the public.

(2) Each licensed facility, as a condition of licensure, shall provide for peer review of physicians who deliver health care services at the facility. Each licensed facility shall develop written, binding procedures by which such peer review shall be conducted. Such procedures shall include:

(a) Mechanism for choosing the membership of the body or bodies that conduct peer review.

(b) Adoption of rules of order for the peer review process.

(c) Fair review of the case with the physician involved.

(d) Mechanism to identify and avoid conflict of interest on the part of the peer review panel members.

(e) Recording of agendas and minutes which do not contain confidential material, for review by the Division of Health Quality Assurance of the agency.

(f) Review, at least annually, of the peer review procedures by the governing board of the licensed facility.

(g) Focus of the peer review process on review of professional practices at the facility to reduce morbidity and mortality and to improve patient care.

(3) If reasonable belief exists that conduct by a staff member or physician who delivers health care services at the licensed facility may constitute one or more grounds for discipline as provided in this subsection, a peer review panel shall investigate and determine whether grounds for discipline exist with respect to such staff member or physician. The governing board of any licensed facility, after considering the recommendations of its peer review panel, shall suspend, deny, revoke, or curtail the privileges, or reprimand, counsel, or require education, of any such staff member or physician after a final determination has been made that one or more of the following grounds exist:

(a) Incompetence.

(b) Being found to be a habitual user of intoxicants or drugs to the extent that he or she is deemed dangerous to himself, herself, or others.

(c) Mental or physical impairment which may adversely affect patient care.

(d) Being found liable by a court of competent jurisdiction for medical negligence or malpractice involving negligent

conduct.

(e) One or more settlements exceeding $10,000 for medical negligence or malpractice involving negligent conduct by the staff member.

(f) Medical negligence other than as specified in paragraph (d) or paragraph (e).

(g) Failure to comply with the policies, procedures, or directives of the risk management program or any quality assurance committees of any licensed facility.

(4) Pursuant to ss. 458.337 and 459.016, any disciplinary actions taken under subsection (3) shall be reported in writing to the Division of Health Quality Assurance of the agency within 30 working days after its initial occurrence, regardless of the pendency of appeals to the governing board of the hospital. The notification shall identify the disciplined practitioner, the action taken, and the reason for such action. All final disciplinary actions taken under subsection (3), if different from those which were reported to the agency within 30 days after the initial occurrence, shall be reported within 10 working days to the Division of Health Quality Assurance of the agency in writing and shall specify the disciplinary action taken and the specific grounds therefor. The division shall review each report and determine whether it potentially involved conduct by the licensee that is subject to disciplinary action, in which case s. 456.073 shall apply. The reports are not subject to inspection under s. 119.07(1) even if the division's investigation results in a finding of probable cause.

(5) There shall be no monetary liability on the part of, and no cause of action for damages against, any licensed facility,

its governing board or governing board members, peer review panel, medical staff, or disciplinary body, or its agents, investigators, witnesses, or employees; a committee of a hospital; or any other person, for any action taken without intentional fraud in carrying out the provisions of this section.

(6) For a single incident or series of isolated incidents that are nonwillful violations of the reporting requirements of this section, the agency shall first seek to obtain corrective action by the facility. If correction is not demonstrated within the timeframe established by the agency or if there is a pattern of nonwillful violations of this section, the agency may impose an administrative fine, not to exceed $5,000 for any violation of the reporting requirements of this section. The administrative fine for repeated nonwillful violations shall not exceed $10,000 for any violation. The administrative fine for each intentional and willful violation may not exceed $25,000 per violation, per day. The fine for an intentional and willful violation of this section may not exceed $250,000. In determining the amount of fine to be levied, the agency shall be guided by s. 395.1065(2)(b).

(7) The proceedings and records of peer review panels, committees, and governing boards or agent thereof which relate solely to actions taken in carrying out this section are not subject to inspection under s. 119.07(1); and meetings held pursuant to achieving the objectives of such panels, committees, and governing boards are not open to the public under the provisions of chapter 286.

(8) The investigations, proceedings, and records of the peer review panel, a committee of a hospital, a disciplinary board, or a governing board, or agent thereof with whom there is a specific written contract for that purpose, as described in this

section shall not be subject to discovery or introduction into evidence in any civil or administrative action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such group or its agent, and a person who was in attendance at a meeting of such group or its agent may not be permitted or required to testify in any such civil or administrative action as to any evidence or other matters produced or presented during the proceedings of such group or its agent or as to any findings, recommendations, evaluations, opinions, or other actions of such group or its agent or any members thereof. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil or administrative action merely because they were presented during proceedings of such group, and any person who testifies before such group or who is a member of such group may not be prevented from testifying as to matters within his or her knowledge, but such witness may not be asked about his or her testimony before such a group or opinions formed by him or her as a result of such group hearings.

(9)(a) If the defendant prevails in an action brought by a staff member or physician who delivers health care services at the licensed facility against any person or entity that initiated, participated in, was a witness in, or conducted any review as authorized by this section, the court shall award reasonable attorney's fees and costs to the defendant.

(b) As a condition of any staff member or physician bringing any action against any person or entity that initiated, participated in, was a witness in, or conducted any review as authorized by this section and before any responsive pleading is due, the staff member or physician

shall post a bond or other security, as set by the court having jurisdiction of the action, in an amount sufficient to pay the costs and attorney's fees.

(10)(a) A hospital's compliance with the requirements of this chapter or s. 766.110(1) may not be the sole basis to establish an agency or partnership relationship between the hospital and physicians who provide services within the hospital.

(b) A hospital may create an agency relationship with a physician by written contract signed by the hospital and:

1. The physician;

2. A health care professional association; or

3. A corporate medical group and its employees. □□A written contract is not the exclusive means to establish an agency or partnership relationship between a hospital and any other person described in this paragraph.

History.--ss. 26, 30, ch. 82-182; s. 1, ch. 82-402; s. 3, ch. 85-175; s. 3, ch. 88-1; s. 2, ch. 88-277; s. 4, ch. 89-162; s. 14, ch. 90-344; ss. 12, 13, 98, ch. 92-289; s. 726, ch. 95-148; s. 213, ch. 96-406; s. 24, ch. 98-89; s. 21, ch. 98-166; s. 13, ch. 2000-160.

Note.--Former s. 395.0115.

(2)

No. 06-918

Supreme Court, U.S.
FILED
FEB 05 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRADLEY S. LOGAN, M.D.,

Petitioner,

v.

HCA INC. *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS HCA INC.; GALEN OF FLORIDA, INC. D/B/A ST. PETERSBURG GENERAL HOSPITAL; HTI MEMORIAL HOSPITAL CORPORATION D/B/A SKYLINE MEDICAL CENTER; DR. DAVID DESPER; DAN FRIEDRICH; DR. AKSHAY DESAI; DR. GEORGE BANKS; ROSEMARY NORTHRUP-BLOOMFIELD; HEALTH SERVICES (DELAWARE), INC.; DANEIL MCAULIFFE; OGDEN & SULLIVAN, P.C.; ROBERT KLEIN; DR. GREGORY NEAL; DR. DAVID MCKEE; DR. LLOYD WALWYN; KELLY DUGGAN; C.J. GIDEON; BRANDY BURNETTE; GIDEON & WISEMAN, PLLC; TRISTAR HEALTH SYSTEMS; STEVEN RILEY; AMY KURZWEG; AND BOWEN, RILEY, WARNOCK & JACOBSON, PLC

ROBERT J. WALKER
Counsel of Record
SARA F. REYNOLDS
WALKER, TIPPS & MALONE
150 Fourth Avenue North, Suite 2300
Nashville, Tennessee 37219
(615) 303-6000

Counsel for HCA-Affiliated Respondents

206478

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's dismissal of Petitioner's claim pursuant to 42 U.S.C. § 1983 does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Sixth Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's dismissal of Petitioner's claim pursuant to the Health Care Quality Improvement Act, 42 U.S.C. § 11101, *et seq.*, does not conflict with a decision of this Court or a Court of Appeals, and where all courts that have addressed the issue have held that the HCQIA does not create a private cause of action for aggrieved physicians.

III. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's dismissal of Petitioner's claim pursuant to 18 U.S.C. §§ 1961-1968 does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Sixth Circuit's ruling implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT

Respondent HCA Inc. does not have a parent corporation. Two affiliates of Merrill Lynch, a publicly traded company, together own more than 10% of HCA Inc. stock.

HCA Inc. is the ultimate parent corporation of Respondents Galen of Florida, Inc. d/b/a St. Petersburg General Hospital, HTI Memorial Hospital Corp. d/b/a Skyline Medical Center; Health Services (Delaware), Inc., and Tristar Health Systems.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 7

I. Petitioner's allegations of conduct on the part of the Respondents fail to rise to the level of state action necessary to state a claim pursuant to 42 U.S.C. § 1983. 7

II. Petitioner has no private cause of action under the Health Care Quality Improvement Act. ... 11

III. Petitioner's Complaint fails to state a claim for RICO violation. 12

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Page

Cases

Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928 (6th Cir. 1987) 8

Blount Financial Service v. Walter E. Heller & Co., 819 F.2d 151 (6th Cir. 1987) 12-13

Brown v. Medical College of Ohio, 79 F. Supp. 2d 840 (N.D. Ohio 1999) 11

Canady v. Providence Hospital, 903 F. Supp. 125 (D.D.C. 1995) 9

Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984) .. 9

Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995) 8

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) 8

Feyz v. Mercy Memorial Hosp., 719 N.W.2d 1 (Mich. 2006) 10

First Capital Asset Management, Inc. v. Satinwood, Inc., 385 F.3d 159 (2d Cir. 2004) 13

Freilich v. Board of Directors of Upper Chesapeake Health, Inc., 142 F. Supp. 2d 679 (D. Md. 2001) 9

Cited Authorities

Page

Hancock v. Blue Cross-Blue Shield of Kansas, Inc., 21 F.3d 373 (10th Cir. 1994) 11

Hawkins v. Kinsey, 540 P.2d 345 (Colo. Ct. App. 1975) 10

Howard v. America Online, Inc., 208 F.3d 741 (9th Cir. 2000) 12, 13

Jackson v. Metro Edison Co., 419 U.S. 345 (1974) ... 10

Jackson v. Norton-Children's Hosps., Inc., 487 F.2d 502 (6th Cir. 1973) 9

Jeung v. McKrow, 264 F. Supp. 2d 557 (E.D. Mich. 2003) 9

Morris v. Emory Clinic, Inc., 402 F.3d 1076 (11th Cir. 2005) 11

Nicholas v. North Colorado Medical Center, Inc., 902 P.2d 462 (Colo. Ct. App. 1995) 9

Pinhas v. Summit Health Ltd., 894 F.2d 1024 (9th Cir. 1989) 9

Sarin v. Samaritan Health Center, 813 F.2d 755 (6th Cir. 1987) 9

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 12

Cited Authorities

Page

Singh v. Blue Cross/Blue Shield of Massachusetts, 308 F.3d 25 (1st Cir. 2002) 11

Wayne v. Genesis Medical Center, 140 F.3d 1145 (8th Cir. 1998) 11

Statutes

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1861, *et seq.* 12

Civil Rights Act, 42 U.S.C. § 1983 .....i, 7, 8

Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, *et seq.* 7, 11

Colo. Rev. Stat. § 12-36.5-103 10

Fla. Stat. ch. 395.0193 10

Tenn. Code Ann. § 63-6-219 10

Rules

Federal Rule of Civil Procedure 12(b)(6) 1, 6

I

INTRODUCTION

Petitioner has not presented any compelling reasons for this Court to grant the Petition for Writ of Certiorari. The District Court and Court of Appeals correctly held, pursuant to Federal Rule of Civil Procedure 12(b)(6), that Petitioner failed to state a claim for violations of the Civil Rights Act, Health Care Quality Improvement Act, and Racketeering and Corrupt Organizations Act. Neither the District Court nor the Court of Appeals issued an opinion in conflict with a decision of this Court or addressing an important federal question that has not been decided by this Court.

STATEMENT OF THE CASE

Petitioner Bradley S. Logan, M.D., ("Logan") filed this lawsuit asserting various claims, including fraud, suppression, civil conspiracy, negligence, wantonness, breach of contract, abuse of process, RICO violations, due process violations, and a cause of action pursuant to the Health Care Quality Improvement Act ("HCQIA"). (R. 1, Complaint; Joint Appendix ("JA") 17-95). Logan filed his 79-page complaint on January 5, 2005, against HCA Inc. ("HCA") and several of its subsidiaries, affiliated hospitals, affiliated employees, affiliated physicians, and agents of its affiliates, as well as several law firms and attorneys who, at one point or another, represented one of the related entities. The complaint requests $250 million in compensatory damages and $2.25 billion in punitive damages. (R. 1, Complaint p.74; JA 80).

The sequence of events set forth in the complaint begins in St. Petersburg, Florida, where Logan, a physician, was a provisional member of the medical staff at St. Petersburg

General Hospital in 1997. (R. 1, Complaint, Facts ¶ 1; JA 27). Logan resigned his clinical privileges in August 1997 as a result of the Quality Improvement Subcommittee's review of the care Logan had provided to certain patients at St. Petersburg General. (R. 1, Complaint, Facts ¶ 5; JA 29). Logan alleges that St. Petersburg General, Dr. Banks, Dr. Desai, Dr. Desper, Dan Friedrich, Rosemary Northup-Bloomfield, Daneil McAuliffe, and Ogden & Sullivan (collectively the "St. Petersburg Defendants") engaged in wrongful conduct surrounding the peer review of Logan's practice, Logan's resignation, and the subsequent reporting of Logan's resignation to the National Practitioner Data Bank and Florida Agency for Health Care Administration. (R. 1, Complaint, Facts ¶ 1-9; JA 27-31).

In addition, Petitioner alleges that several of the St. Petersburg Defendants caused a breach of the office lease agreement between Columbia-Pinellas and Group Medica of Florida, Logan's professional corporation. (R. 1, Complaint, Facts ¶ 9; JA 31). A judgment was rendered against Group Medica in Florida state court. (R. 1, Complaint, Facts ¶ 82; JA 68). On October 23, 2003, Health Services (Delaware), Inc. d/b/a Columbia-Pinellas ("Columbia-Pinellas") filed an action in Tennessee Chancery Court seeking to enforce the Florida judgment against Logan by piercing the corporate veil. (R. 1, Complaint, Facts ¶ 82; JA 68). Steve Riley and Amy Kurzweg of the law firm Bowen, Riley, Warnock & Jacobson (collectively the "Bowen Riley Defendants"), named defendants in this action, represented Columbia-Pinellas in the Tennessee Chancery action. (R. 1, Complaint, Facts ¶ 82; JA 68).[1] Logan alleges that the attorneys' conduct

[1] The Chancery Court action is now complete. Columbia-Pinellas was not able to pierce the corporate veil and enforce the judgment against Logan.

constitutes an abuse of process, civil conspiracy, and violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act.

After his resignation in 1997 from the staff of St. Petersburg General Hospital, Logan moved to Lawrenceburg, Tennessee and began a practice at Crockett General Hospital, another HCA affiliate, on March 1, 1998. (R. 1, Complaint, Facts ¶ 11; JA 32). Logan alleges that Jack Buck, Marjorie Nix, Dr. Virgil Crowder, Dr. Penny Mediate, and Lifepoint Hospitals, Inc. (collectively the "Crockett Defendants") wrongfully misrepresented information regarding the practice characteristics in Lawrenceburg and the hospital's plans to build a Women's Center, hired another obstetrician/ gynecologist (Dr. Huckaby), conducted an outside chart review of Logan's cases, encouraged Dr. Huckaby to leave her partnership with Logan, and conducted a chart review of Logan's cases within the hospital's Performance Improvement Committee. (R. 1, Complaint, Facts ¶ 11-24; JA 32-36). Due to perceived "economic pressures" and the Crockett Defendants' alleged refusal to help address those pressures, Logan decided to leave Lawrenceburg effective January 2002. (R. 1, Complaint, Facts ¶ 25-26; JA 36-38). Lifepoint Hospitals, Inc., (which had acquired Crockett General Hospital from an HCA affiliate) served Logan with a notice of intent to arbitrate a breach of contract dispute in April 2002. (R. 1, Complaint, Facts ¶ 26; JA 37-38).

On September 24, 2001, Logan submitted an application for clinical privileges at Skyline Medical Center ("Skyline"), an HCA-affiliated hospital located in Nashville. (R. 1, Complaint, Facts ¶ 30; JA 39). On November 9, 2001, Logan entered into a recruiting agreement with Skyline. (R. 1, Complaint, Facts ¶ 31; JA 39). On December 13, 2001, the

Skyline Credentials Committee met and considered Logan's application for privileges, and Logan was requested to appear for an interview at the committee's February 28, 2002, meeting. (R. 1, Complaint, Facts ¶ 33, 37; JA 39, 40). Logan alleges that Skyline wrongfully gathered and considered information, some of which was allegedly false, regarding his practice history at St. Petersburg and Crockett. (R. 1, Complaint, Facts ¶ 34-41; JA 39-42). Logan met with the Skyline Credentials Committee on February 28, 2002, and the committee voted not to recommend his application for privileges. (R. 1, Complaint, Facts ¶ 42; JA 42). On March 4, 2002, Logan withdrew his application for privileges at Skyline. (R. 1, Complaint, Facts ¶ 43; JA 42).

On August 9, 2002, Logan submitted a second application for privileges to Skyline. (R. 1, Complaint, Facts ¶ 51; JA 44). On November 7, 2002, Logan met with C.J. Gideon, an attorney hired by Skyline to investigate Logan's application for privileges. (R. 1; Complaint, Facts ¶ 54-55; JA 45-46). Mr. Gideon discussed documents regarding Logan's residency training at the University of Calgary during that meeting. (R. 1, Complaint, Facts ¶ 55; JA 46). On December 12, 2002, the Skyline Credentials Committee met, considered Logan's second application for privileges, and questioned Logan. (Complaint, Facts ¶ 57, 59; JA 46-47). On January 7, 2003, the Skyline Medical Executive Committee met to consider Logan's second application for privileges. (R. 1, Complaint, Facts ¶ 61; JA 47-48). Logan was informed on January 10, 2003, that the MEC recommended his second application for privileges be denied. (R. 1, Complaint, Facts ¶ 66; JA 49). Logan alleges that the meetings of the Skyline Medical Executive, Hearing, and Credentials Committees were unfair, biased, and failed to comply with various laws. (R. 1, Complaint, Facts ¶ 57-67; JA 46-50).

On January 15, 2003, Logan requested a formal hearing on his application for privileges. (R. 1, Complaint, Facts ¶ 68; JA 50). Skyline held the hearing on May 19, 2003. (R. 1, Complaint, Facts ¶ 74; JA 52). Logan alleges that the hearing, and events leading thereto, were once again unfair and biased, and that Mr. Gideon, Brandy Burnette, Dr. David McKee, Robert Klein, Dr. Gregory Neal, Kelly Duggan, and Dr. Lloyd Walwyn (collectively the "Skyline Defendants) engaged in misrepresentations and other wrongful conduct during the course of the hearing and committee meetings. (R. 1, Complaint, Facts ¶¶ 69, 70-72, 74; JA 50-65).[2] On July 7, 2003, the Skyline Medical Executive Committee met and voted to accept the Hearing Committee's recommendation to deny Logan's second application for privileges. (R. 1, Complaint, Facts ¶ 77; JA 66). On July 10, 2003, Logan sent Mr. Klein a letter purporting to withdraw his second application for privileges. (R. 1, Complaint, Facts ¶ 78; JA 66). Logan claims that Skyline and Mr. Klein thereafter wrongfully entered a report with the National Practitioner Data Bank stating that Logan's application for privileges had been denied. (R. 1, Complaint, Facts ¶ 80; JA 67).

On January 5, 2005, Logan commenced this lawsuit by filing his complaint in the United States District Court for the Middle District of Tennessee. (R. 1, Complaint; JA 17). Petitioner generally alleges that the Defendants, by and through their various wrongs and breaches of his Constitutional and statutory rights, engaged in a fraudulent scheme to ruin his professional image as a physician and

[2] The complaint contains more than one set of paragraphs numbered 71, 72, and 74. This cite refers to the first set of paragraphs identified in the Complaint as Paragraphs 71, 72 and 74.

thwart his ability to practice medicine. (R. 1, Complaint; JA 17-95). The Defendants filed motions to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (R. 37, 45, 46, 47, 48, 49, 50, 52, 56, 57, 61; JA 151, 174, 182, 202).

The motions were referred to the Magistrate Judge and heard on April 12, 2005. (R. 81). On May 23, 2005, the Magistrate Judge issued a Report and Recommendation, finding that Logan's federal claims failed to state a claim on which relief could be granted, and recommending that the remaining state law claims be dismissed for lack of jurisdiction. (R. 85, Report and Recommendation; JA 221). Logan filed objections Report and Recommendation. (R. 86, Objections by Plaintiff to Report and Recommendation; JA 231). The District Court subsequently entered a Memorandum and Order adopting the Magistrate Judge's Report and Recommendation and dismissing Logan's claims with prejudice. (R. 90, 91, Memorandum and Order; JA 247, 261).

On December 30, 2005, Petitioner timely filed a Notice of Appeal of the District Court's decision to the United States Court of Appeals for the Sixth Circuit. (R. 92, Notice of Appeal; JA 262). On appeal Logan argued that (1) hospital peer review activities constitute action under color of state law, (2) the Health Care Quality Improvement Act creates Constitutional due process rights, and (3) the Defendants' actions in mailing or otherwise disseminating physician peer review committee results constitute a cognizable cause of action under the federal RICO statute. In a decision issued on October 5, 2006, the Court of Appeals held that (1) Logan failed to assert facts sufficient to rise to the level of state

action or to state a cognizable claim pursuant to 42 U.S.C. § 1983, (2) the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11101, *et seq.*, does not create a private right of action for aggrieved physicians, and (3) Logan failed to assert facts sufficient to state a claim for violation of the RICO statute, 18 U.S.C. §§ 1961-1964.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate an important federal question that has not been decided by this Court. Accordingly, Petitioner has failed to carry his burden of demonstrating any compelling reasons for the Petition to be granted. *See* Sup. Ct. R. 10.

I. Petitioner's allegations of conduct on the part of the Respondents fail to rise to the level of state action necessary to state a claim pursuant to 42 U.S.C. § 1983.

Petitioner alleges that various defendants violated his Constitutional due process rights under 42 U.S.C. § 1983 by failing to provide him with fair peer review hearings and submitting false reports to the National Practitioner Data Bank and the Florida Agency for Healthcare Administration. (R. 1, Complaint, Count Nine p. 70; JA 86). Logan's allegations of due process violations fail to state a claim upon which relief can be granted.

This Court has recognized that:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life,

> liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989). Indeed, "it is axiomatic that constitutional due process protections do not extend to 'private conduct abridging individual rights.'" *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1190 (11th Cir. 1995). Therefore, to assert an actionable claim under § 1983 against a non-governmental defendant, the plaintiff must demonstrate that there is a sufficient nexus between the state and the individual defendant to justify treating the conduct as "state action." *Id.* at 1191.

Logan has failed demonstrate state action in this case, and the decisions of the District Court and Sixth Circuit were correct applications of the law. Furthermore, contrary to the arguments set forth in the Petition, the decision of the Court of Appeals does not conflict with a decision of this Court or any Court of Appeals. There is no authority to support Petitioner's position that the peer review actions of a private hospital constitute state action for purposes of § 1983.

Petitioner argues that the Respondents' actions pursuant to the HCQIA and relevant peer review statutes constitute the requisite state action necessary to state a § 1983 claim. The HCQIA is a federal statute, not a state statute. Conduct pursuant to a federal statute cannot form the basis for a § 1983 action. *Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 981 (6th Cir. 1987).

Petitioner's arguments with regard to the state peer review statutes are equally without merit. This is not a case where the activities of the state and the private entity are so closely entwined as to be the same. The cases cited in the Petition fail to support Logan's position, and the clear weight of authority holds that non-governmental hospitals and their employees are not state actors as a matter of law. *See, e.g.*, *Sarin v. Samaritan Health Center*, 813 F.2d 755, 759 (6th Cir. 1987) (in action relating to revocation of physician's privileges, no state action even though hospital licensed by the state and received federal funds); *Crowder v. Conlan*, 740 F.2d 447, 449-453 (6th Cir. 1984) (hospital not a state actor even when public officials sit on its board); *Jackson v. Norton-Children's Hosps., Inc.*, 487 F.2d 502, 503 (6th Cir. 1973) (private hospital's action in discharging a physician was not state action within the meaning of Section 1983); *Pinhas v. Summit Health Ltd.*, 894 F.2d 1024 (9th Cir. 1989) (holding that hospital's peer review process did not constitute state action); *Jeung v. McKrow*, 264 F. Supp. 2d 557, 571 (E.D. Mich. 2003) (in suit brought by physician, hospital and its administrators were not state actors within the meaning of Section 1983); *Canady v. Providence Hospital*, 903 F. Supp. 125, 127 (D.D.C. 1995) ("A decision to restrict staff privileges does not constitute state action."); *Freilich v. Board of Directors of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679 (D. Md. 2001).

Petitioner incorrectly cites *Nicholas v. North Colorado Medical Center, Inc.*, for the proposition that peer review committees are state actors. *See* (Petition at 9); *Nicholas v. North Colorado Medical Center, Inc.*, 902 P.2d 462 (Colo. Ct. App. 1995). The committee at issue in that case was one formed by the state Board of Medical Examiners to monitor anticompetitive conduct. *Id.* at 464. It was cloaked with the

authority of the state by the specific language of the statute. Colo. Rev. Stat. § 12-36.5-103. The statutes at issue in this case contain no such language.

The language of the Tennessee and Florida peer review statutes undermines Petitioner's claim of state action on the part of the Respondents. The statutes encourage medical providers to engage in candid, thorough, and critical reviews of their peers, creating certain immunities for persons who serve on peer review committees. Fla. Stat. ch. 395.0193; Tenn. Code Ann. § 63-6-219. *Id.* The Florida and Tennessee state legislatures do not direct or oversee the evaluation or decision-making process, and the statutes provide no basis for Petitioner's allegation of state action.

The fact that a minority of states permit judicial review of peer review decisions does not make the hospital committees state actors. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment"). None of the cases cited by Petitioner support his position to the contrary. *Hawkins v. Kinsey*, cited in the Petition, actually undermines Logan's argument. The court in that case stated that while "the hospitals serve the general public, this factor, standing alone, does not make them public agencies." 540 P.2d 345, 348 (Colo. Ct. App. 1975) (not selected for official publication). The *Feyz v. Mercy Memorial Hospital* decision cited at length in the Petition was vacated on appeal. *Feyz v. Mercy Memorial Hosp.*, 719 N.W.2d 1 (Mich. 2006). The Michigan Supreme Court declined to address whether the hospital was subject to the civil rights statutes. *Id.* at 16.

Logan has clearly failed to demonstrate state action on the part of the Respondents, and there is no compelling reason for the Petition to be granted.

II. Petitioner has no private cause of action under the Health Care Quality Improvement Act.

Petitioner asserted independent claims against various Respondents pursuant to the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, *et seq.* ("HCQIA"). (R. 1, Complaint, Count Ten, p. 72; JA 88). The HCQIA was enacted in order to "shield health care entities and individual physicians from liability for damages for actions performed in the course of monitoring the competence of health care personnel." *Singh v. Blue Cross/Blue Shield of Massachusetts*, 308 F.3d 25, 31 (1st Cir. 2002).

While this Court has not yet spoken on the issue, every court presented with an aggrieved physician asserting a claim under HCQIA has held that HCQIA does not create a private right of action. *Brown v. Medical College of Ohio*, 79 F. Supp. 2d 840, 844-45 (N.D. Ohio 1999); *see also Singh*, 308 F.3d at 45; *Wayne v. Genesis Medical Center*, 140 F.3d 1145, 1148 (8th Cir. 1998); *Hancock v. Blue Cross-Blue Shield of Kansas, Inc.*, 21 F.3d 373, 374 (10th Cir. 1994); *Morris v. Emory Clinic, Inc.*, 402 F.3d 1076, 1083 (11th Cir. 2005). There is nothing in the legislative history or language of the statute to support Petitioner's claim. Because there is no private right of action under HCQIA, Logan's claim for violations of HCQIA fails to state a claim upon which relief may be granted. There is no compelling reason to grant the Petition with respect to the HCQIA claim. The decision of the Sixth Circuit is not only not in conflict with any opinion of this Court or any other Court of Appeals, but it is in line with decisions of other Courts of Appeal.

III. Petitioner's Complaint fails to state a claim for RICO violation.

Petitioner alleges that the various Respondents violated the RICO Act by conspiring to commit fraud, breach contracts, violate the HCQIA, and to publicize stigmatizing statements. (R. 1, Complaint, Count Eight, p. 67; JA 83). The District Court held that Petitioner failed to allege wrongful acts that qualified as racketeering activity. (R. 85, Report and Recommendation; JA 228). The District Court also found that Petitioner failed to allege fraud with the required specificity. (R. 90, Memorandum; JA 259). The Sixth Circuit held that "Logan's allegations do not establish that the defendants formed an enterprise as defined by RICO." Petitioner's RICO Act claim is essentially a summary of his other claims, with an additional allegation that the Respondents' conduct violates 18 U.S.C. § 1861, *et seq.* (*See* R. 1, Complaint, Count Eight, p. 67; JA 83). The allegations of the complaint are insufficient to state a RICO Act claim upon which relief can be granted.

In order to state a claim under RICO, a plaintiff must plead the following elements with specificity: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). A general allegation of racketeering or the perpetration of fraud is insufficient to establish a RICO Act claim. *See Howard v. America Online, Inc.*, 208 F.3d 741, 748-49 (9th Cir. 2000). Furthermore, a RICO Act complaint alleging fraud must state with particularity (1) the false statement made by the defendant, (2) which the plaintiff relied on, and (3) the facts demonstrating the plaintiff's reliance on the defendant's false statement of fact. *Blount Financial Service v. Walter E. Heller & Co.*, 819 F.2d 151 (6th Cir.

1987). In addition to alleging the particular details of a fraud, "the plaintiff must allege facts that give rise to a strong inference of fraudulent intent." *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159, 179 (2d Cir. 2004).

Petitioner failed to plead with particularity the necessary elements to state a claim under the RICO Act. The Complaint consists merely of generalized allegations of fraud without any showing that a material fact was misrepresented to Logan.[3] Logan has also failed to demonstrate that the acts alleged are indictable. "Citing acts as part of a RICO pattern, without proving that they are indictable, is not sufficient." *Howard v. America Online, Inc.*, 208 F.3d 741, 748 (9th Cir. 2000).

In addition to the deficiencies relied upon by the District Court and Sixth Circuit, Petitioner failed to allege any reliance on the communications enumerated in the Complaint. The Complaint generally alleges that Respondents committed mail and wire fraud by publishing various "stigmatizing statements" about Petitioner. The majority of these communications were sent to third parties. (*See* Petition at 24-26). Rather than exercising reliance on these statements, Logan claims to have disputed them and proclaimed their falsity as soon as he heard them. Such action is the opposite of reliance.

---

[3] The Appendix to the Complaint, set forth in the Petition, which supposedly itemizes the acts of mail and wire fraud is merely a list of communications. It does not specify the substance of the communications, nor does it demonstrate any of the elements of a cause of action pursuant to the RICO Act. (*See* Petition at 21-26).

The holdings of the District Court and Sixth Circuit were correct. Petitioner failed to state a valid RICO claim, and there is no compelling reason for this Court to grant the Petition.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

ROBERT J. WALKER
Counsel of Record
SARA F. REYNOLDS
WALKER, TIPPS & MALONE
150 Fourth Avenue North, Suite 2300
Nashville, Tennessee 37219
(615) 303-6000
Counsel for HCA-Affiliated Respondents